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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ZENITH RADIO CORPORATION, *Petitioner*,

v.

THE UNITED STATES and MONTGOMERY WARD & CO., INCORPORATED, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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QUESTIONS PRESENTED

1. Whether United States Government officials may avoid the specific remedial provisions of the Trade Agreements Act of 1979, including the statutorily mandated assessment of antidumping duties following proceedings on the public record where representatives of the domestic industry and labor may participate as a matter of right and thereafter seek judicial review (19 U.S.C. §§ 1675(a), (d); 1516a(a)(2)), by secretly entering into bilateral settlement agreements with representatives of importing interests under a claimed general compromise authority (19 U.S.C. § 1617) which had its conceptual origin during the Civil War and which was enacted for the purpose of maximizing the revenues of the United States.

2. Whether the Court of International Trade may review agreements between the United States and importers compromising potential Government claims for antidumping duties, when the agreements are claimed to have been negotiated and executed by United States Government officials in bad faith, on the basis of political and other irrelevant considerations, in complete abrogation of the enforcement responsibilities of the Department of Commerce under the antidumping law.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
Background	2
Proceedings in the Trial Court	6
Decision of the Court of Customs and Patent Appeals	9
REASONS FOR GRANTING THE PETITION	10
This Case Presents Important Questions Of Federal Statutory And Administrative Law	10
CONCLUSION	18

TABLE OF AUTHORITIES

CASES: Page

C.J. Tower & Sons v. *United States*, 21 CCPA 417, T.D. 46943 (1934) 3

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 13

Dunlop v. *Bachowski*, 421 U.S. 560 (1975) 13

United States v. *George*, 25 Fed. Cas. 1277 (C.C.S.D.N.Y. 1869) 12

Wong Wing Hang v. *Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966) 13

Zenith Radio Corporation v. *United States*, 505 F. Supp. 216 (CIT 1980) 6, 7

Zenith Radio Corporation v. *United States*, 1 CIT 59, Slip Op. 80-11, 15 Cust. Bull. & Dec. No. 1, 29 (1980) 7

Zenith Radio Corporation v. *United States*, 509 F. Supp. 1282 (CIT 1981) 7

Zenith Radio Corporation v. *United States*, 3 CIT ____, Slip Op. 82-51 (June 29, 1982) 10

STATUTES, REGULATIONS, AND RULES:

Act of March 3, 1863, 12 Stat. 737
Section 10 12

Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980)
Section 201 6

Rev. Stat. § 3469 12

Tariff Act of 1930, as amended
Section 516A (19 U.S.C. § 1516a) 4, 6, 10
Section 617 (19 U.S.C. § 1617) 5, 6, 7, 9, 10, 11, 12, 13
Section 751 (19 U.S.C. § 1675) 3, 4, 6, 10
Section 751(a) (19 U.S.C. § 1675(a)) 4
Section 751(d) (19 U.S.C. § 1675(d)) 4

Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979)
Section 101 ..... 3, 4

Table of Authorities Continued

	Page
Section 106	3
Section 106(a)	3
Section 107	3
Section 1001	4
Section 1002(b)(3)	4
28 U.S.C. § 1256	2
28 U.S.C. § 1541(c)	7
28 U.S.C. § 1581(c)	6
28 U.S.C. § 1581(i)	6
19 CFR § 153.49 (1979)	15
19 CFR § 353.55 (1981)	15
Rules of the United States Court of International Trade Rule 54(b)	7
MISCELLANEOUS:	
61 Cong. Globe 906 (1863)	12
Davis, *Administrative Law Treatise*, § 28.16 (Supp. 1982)	13
Exec. Order 12188, 45 Fed. Reg. 989 (1980)	4
H.R. Rep. No. 96-317, 96th Cong., 1st Sess. (1979)	4
H.R. Rep. No. 96-585, 96th Cong., 1st Sess. (1979)	4
Hearings on the Implementation of the Multilateral Trade Negotiations before the Subcomm. on International Trade of the Senate Comm. on Finance, 96th Cong., 1st Sess. (1979)	3
Hearings on Legislation Necessary to Implement the Multilateral Trade Agreement Concluded in Geneva, Switzerland before the Subcomm. on Trade of the House Comm. on Ways and Means, 96th Cong., 1st Sess. (1979)	3
12 Op. Att'y Gen. 543 (1868)	12
16 Op. Att'y Gen. 384 (1879)	12
16 Op. Att'y Gen. 617 (1879)	12

Table of Authorities Continued

	Page
21 Op. Att'y Gen. 361 (1896)	12
36 Op. Att'y Gen. 40 (1929)	12
Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979)	4, 9
Reorganization Plan No. 3 of 1979: Hearings before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. (1979)	4
S. Rep. No. 96-249, 96th Cong., 1st Sess. (1979)	4
S. Rep. No. 96-402, 96th Cong., 1st Sess. (1979)	4
Smith, *Customs Valuation in the United States* (1948)	12
T.D. 71-76, 36 Fed. Reg. 4597 (1971)	5
Taussig, *The Tariff History of the United States* (8th ed. 1931; 1967 reprint)	12
U.S. Treasury, *Annual Report (1862)* [Sen. Ex. Doc. No. 1, 37th Cong., 3d Sess. (1863)]	12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The petitioner, Zenith Radio Corporation,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Customs and Patent Appeals entered in this proceeding on March 11, 1982.

OPINIONS BELOW

The opinion of the United States Court of Customs and Patent Appeals (App. A, *infra*, 1a-20a) is reported at 673 F.2d 1254 (1982). That opinion reversed orders of the United States Court of International Trade entered on May 13, 1981 (App. B, *infra*, 21a-26a) and June 18, 1981 (App. C, *infra*, 27a). The order of May 13, 1981 is re-

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[1] Petitioner has no parent companies, subsidiaries (other than wholly owned subsidiaries) or affiliates.

ported at 15 Cust. Bull. & Dec. No. 23, 106 (1981); the order of June 18, 1981 is not reported.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on March 11, 1982. A timely petition for rehearing was denied (Judge Miller dissenting) on May 13, 1982 (App. D, *infra*, 29a-30a), and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1256.

STATUTES INVOLVED

The relevant provisions of the Antidumping Act of 1921, as amended, the Tariff Act of 1930, as amended, the Trade Agreements Act of 1979, and 28 U.S.C. are set forth in a statutory appendix (App. E, *infra*, 31a-45a).

STATEMENT OF THE CASE

Background

Dumping—whether of Japanese television receivers, which this case involves, or any other imported merchandise—is the act of selling imported goods in the country of importation at less than the market price (or below the cost of production) in the home market. When it is practiced on a scale that is injurious to an industry in the importing country, dumping is universally recognized and condemned as an unfair trade practice by most civilized nations. Responsible enforcement of the antidumping law, mandated by the Trade Agreements Act of 1979, is indisputably one of our nation's most vital means of combating unfair international trade practices that have

decimated important targeted industries in the United States over the past decade.[2]

In 1979, after investigating the dismally poor record of the Treasury Department in administering the Antidumping Act of 1921—with respect to products in general and with respect to Japanese television receivers in particular—Congress enacted major procedural reforms mandating improved enforcement.[3] Among other things, Congress provided for a totally new framework for administrative and judicial review, designed to pre-

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[2] The clear purpose of our antidumping law is to provide for the assessment of additional duties designed to offset the margin of unfair pricing, or dumping, of imported merchandise. *See C. J. Tower & Sons* v. *United States*, 21 CCPA 417, 424-26, T.D. 46943 (1934). This law, originally the Antidumping Act of 1921, was codified as 19 U.S.C. § 160-173. Effective January 1, 1980, the "Antidumping Act" was replaced when the essential provisions of that law were incorporated in the Tariff Act of 1930, as amended (codified in 19 U.S.C. §§ 1673-1673i, 1677-1677b). Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 107, 106, 101, 93 Stat. 144 (1979). Dumping findings in effect on January 1, 1980 remained in effect beyond that date, "subject to review under [the newly added] section 751 of the Tariff Act of 1930 [19 U.S.C. § 1675]." Trade Agreements Act of 1979, section 106(a).

[3] Congress had learned that extensive and unconscionable delays in the assessment process, an inadequate desire by Treasury to assess the proper amount of duties due and an inadequate statutory procedure for judicial review by domestic interests frustrated the legislative intention that domestic industry and labor be protected against dumped imports. *See, e.g., Hearings on Legislation Necessary to Implement the Multilateral Trade Agreement Concluded in Geneva, Switzerland before the Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 13, 17, 25, 34, 93, 106, 107, 245, 325, 328-30, 331-34, 337-38, 395, 426, 623, 630-32, 646-49 (1979); *Hearings on the Implementation of the Multilateral Trade Negotiations before the Subcomm. on International Trade of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 207-11, 284-85 (1979).

vent further ineffectual *ex parte* determinations of antidumping duties and to assure the protection of the rights of domestic industry and labor—*i.e.*, the intended beneficiaries of our antidumping legislation. Thus, Congress (a) mandated that such parties be permitted to participate in the administrative process by which the amount of antidumping duties to be assessed is determined and (b) established the right of such parties to judicial review.[4]

Effective January 1, 1980, the determination of antidumping duties on entries of merchandise subject to a finding of dumping and not assessed with antidumping duties as of that date became governed by the system of administrative and judicial review required by sections 751 and 516A. Additionally, Congress persuaded the Executive Branch to reorganize its trade law enforcement function—effective January 2, 1980—so as to transfer the responsibility for administering the antidumping and countervailing duty laws from the Treasury Department to the Commerce Department.[5]

Against this background, in early 1980, U.S. Government officials—without the knowledge or participation of

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[4] Trade Agreements Act of 1979, section 101 (adding section 751(a), (d) to the Tariff Act of 1930 [19 U.S.C. § 1675(a), (d)], section 1001 (adding section 516A to the Tariff Act of 1930 [19 U.S.C. § 1516a]), and section 1002(b)(3). *See H.R. Rep. No. 96-317*, 96th Cong., 1st Sess. 69-72, 179-83 (1979); *S. Rep. No. 96-249*, 96th Cong., 1st Sess. 75-77, 79-81, 244-56 (1979).

[5] *See, e.g., H.R. Rep. No. 96-585*, 96th Cong., 1st Sess. 6-7 (1979); *S. Rep. No. 96-402*, 96th Cong., 1st Sess. 12, 23-24 (1979); *Reorganization Plan No. 3 of 1979: Hearings before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 174-75, 186 (1979); Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979); Exec. Order 12188, 45 Fed. Reg. 989 (1980).

domestic television interests—engaged in secret negotiations with Japanese Government officials, Japanese television manufacturers, and importers of Japanese television receivers for the purpose of disposing of the question of antidumping duty liability on approximately $2 billion worth of Japanese television receivers imported into the United States during most of the 1970's.[6] These negotiations culminated in agreements, entered into on or about April 28, 1980, between the United States and various importers, providing for no antidumping duty assessments on imports made through March 31, 1979, but for lump sum settlement payments to the Government totalling approximately $70 million. The Commerce Department's General Counsel publicly announced at the time that the agreements were permitted by the general compromise authority of section 617 of the Tariff Act of 1930, as amended (19 U.S.C. § 1617). No explanation was given, however, for the failure of the Commerce Depart-

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[6] A finding of dumping with respect to Japanese television receivers was published by the Secretary of the Treasury in March 1971, after he made a determination that such merchandise was being sold at less than fair value and after the Tariff Commission (now, International Trade Commission) made a determination that the dumping of such merchandise was injuring a domestic industry. T.D. 71-76, 36 Fed. Reg. 4597 (1971). The publication of this finding (which is still in effect) required the ascertainment of antidumping duty on all importations of Japanese television receivers and the assessment of antidumping duty thus ascertained. Over the years that followed the publication of the finding, the antidumping law was not significantly enforced. By the end of 1979, there existed a backlog of over five years worth of unliquidated (unassessed) entries. Antidumping duties which were assessed in the liquidation of earlier entries were, for the most part, not collected; moreover, many of those duty determinations were based on false invoices which masked the true margins of dumping.

ment to follow the specific procedures of the new Trade Agreements Act.[7]

Proceedings in the Trial Court

On May 28, 1980, petitioner, a domestic manufacturer of television receivers, commenced an action against the United States in the United States Customs Court (now, United States Court of International Trade), for the purpose of setting aside the settlement agreements.[8] Petitioner pleaded two causes of action: first, that the settlement agreements were *ultra vires*, beyond the authority of section 617, and in defiance of the congressional will expressed in sections 751 and 516A; and second, that, in any event, the agreements were negotiated and entered into by United States Government officials in bad faith.

In December 1980, the trial court, finding that petitioner had made a strong preliminary showing of bad faith on

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[7] However, in a private memorandum to the Secretary of Commerce, dated April 28, 1980, the General Counsel made the following admission:

> This case, of course, need not be settled. It could be processed and litigated through the normal processes. Normal processing, it may be argued, would be more faithful to the requirements and spirit of the new Antidumping Law. It can also be seen as important to the integrity of the process; settlement can conversely be characterized as inconsistent with the objectives and procedures of the new law. *These are valid points.* [Emphasis added.]

Administrative Record Doc. No. EE at 8.

[8] An amended complaint was filed on November 3, 1980 (App. F, *infra*, 47a-88a), invoking the jurisdiction of the court alternatively under 28 U.S.C. § 1581(c) and 28 U.S.C. § 1581(i), as added by the Customs Courts Act of 1980, Pub. L. No. 96-417, § 201, 94 Stat. 1727, 1728 (1980). Subsequently, the Government expressly conceded and the trial court found that subject matter jurisdiction exists under 28 U.S.C. § 1581(i). *See Zenith Radio Corporation* v. *United States*, 505 F. Supp. 216 (CIT 1980) (App. G, *infra*, 89a-96a (*esp.* 91a)).

the part of Government officials who negotiated and executed the settlement agreements, preliminarily enjoined the implementation of the settlement agreements, *Zenith Radio Corporation* v. *United States*, 505 F. Supp. 216 (CIT 1980) (App. G, *infra*, at 92a-93a), and permitted the petitioner to engage in discovery against the Government, *Id.* v. *Id.*, 1 CIT 59, Slip Op. 80-11, 15 Cust. Bull. & Dec. No. 1, 29 (1980) (App. H, *infra*, 97a-98a).[9] On February 27, 1981, the trial court awarded summary judgment to the Government on petitioner's first cause of action. *Zenith Radio Corporation* v. *United States*, 509 F. Supp. 1282 (CIT 1981) (App. I, *infra*, 99a-109a).[10]

On May 13, 1981, the trial court issued a comprehensive discovery order, in which it directed the Government to make numerous documents available to petitioner's coun-

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[9] The Government did not exercise its statutory right under 28 U.S.C. § 1541(c) to appeal from the preliminary injunction.

[10] The trial court found no repugnancy between the new, specific Trade Agreements Act amendments and the general compromise authority in section 617, because of its view that "[a]ny person adversely affected by the decision to settle may then seek judicial review of the Secretary's action." App. I, *infra*, at 108a. The court continued: "Considering that judicial review is thus available and that settlement may expedite the collection of antidumping duties, these procedures do not frustrate the Congressional purpose underlying section 751." *Id.*

This decision, which was on just one of petitioner's claims, was not final and was not appealable. *See, e.g.*, Rule 54(b), Rules of the United States Court of International Trade. As petitioner later advised the Court of Customs and Patent Appeals in its petition for rehearing at 2, "it has always been . . . [petitioner's] intention to take an appeal from any portion of the . . . [trial] court's final decision and judgment, once issued, which rejects our contention that the Secretary of Commerce had no statutory authority to enter into the settlements."

sel, under terms of a protective order (App. B, *infra*, 21a-26a). Included among these documents were certain files compiled by the Government, relating to Montgomery Ward & Co., Incorporated ("Wards"), an importer of Japanese television receivers who, several weeks earlier, had sought and obtained permission to intervene in the underlying litigation for the limited purpose of opposing the Government's production of such files, which, according to Wards, contained its confidential business information.

After its motion for rehearing was denied on June 18, 1981 (App. C, *infra*, 27a), Wards filed an appeal with the Court of Customs and Patent Appeals from the May 13 and June 18, 1981 orders, to the extent that they related to Wards' documents. On July 7, 1981, the Court of Customs and Patent Appeals issued an order staying the trial court's discovery order pending appeal insofar as that order related to the production of the Wards file.[11]

While the Wards appeal was pending, the underlying litigation continued: the Government produced many documents, pursuant to the trial court's discovery order, and numerous Government and former Government officials were deposed. Information obtained from these documents and depositions has been highly probative of the bad faith which petitioner has alleged.

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[11] The appellate court's stay order also provided that "absent contrary notice, this appeal will be heard without the necessity of filing a transcript [of the voluminous record—including numerous briefs and exhibits] and without oral argument." No contrary notice was ever issued and the appeal was heard and determined without a transcript or oral argument.

Decision of the Court of Customs and Patent Appeals

The issue raised by Wards' appeal of the trial court's discovery orders was whether that court abused its discretion in ordering the Government to make available to petitioner's counsel, under the terms of a protective order, the Wards file.[12]

In its decision of March 11, 1982, the Court of Customs and Patent Appeals determined that it had jurisdiction over the appeal. The court proceeded to hold, *sua sponte*—without oral argument, without briefing on point, without a printed transcript, and without any of the revealing discovery documents—(a) that the Secretary of Commerce had clear authority to enter into the subject settlements by virtue of section 617 of the Tariff Act and Reorganization Plan No. 3 of 1979 and (b) that petitioner's claim of bad faith was essentially nonjusticiable since the Secretary's decision to settle was action committed by law (under section 617) to agency discretion and not judicially reviewable. The court concluded by reversing the trial court's discovery order and remanding with directions to dismiss the entire action for lack of subject matter jurisdiction.[13]

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[12] Petitioner also raised the issue of whether the Court of Customs and Patent Appeals had jurisdiction over the appeal. The Wards documents were not claimed to be and were not privileged. Had the Government produced the documents to petitioner's counsel under terms of a protective order, Wards would not have experienced any hardship.

[13] The petition for rehearing filed by petitioner was denied (although in the order on rehearing (a) it was noted that Judge Miller would grant rehearing and (b) the original opinion was modified, but not materially). *See* App. D, *infra*, at 29a-30a.

REASONS FOR GRANTING THE PETITION

This Case Presents Important Questions Of Federal Statutory And Administrative Law.

As Judge Maletz of the Court of International Trade observed in his recent ruling denying the Government's motion to dissolve the preliminary injunction in this case, "[there is no] doubt that important and novel questions of statutory and administrative law are presented for Supreme Court review." *Zenith Radio Corporation* v. *United States*, 3 CIT ____, Slip Op. 82-51 (June 29, 1982) (App. J, *infra*, 111a-112a). The importance of these questions extends far beyond the petitioner and those involved in the television industry.

1. By ruling, in effect, that the Executive Branch may evade the specific provisions of sections 751 and 516A through exclusive reliance on the general compromise authority of section 617, the Court of Customs and Patent Appeals has threatened the effectiveness of the carefully conceived and articulated provisions of the Trade Agreements Act of 1979 which were designed to inhibit or neutralize unfair international trade practices and to prevent the abuses which had plagued the administration of the Antidumping Act from continuing. This vital issue was decided without its having been presented on appeal, without its having been briefed, and without its having been argued. The appeals court simply disposed of the question without analysis or elaboration, stating that "[t]he authority for settlement of antidumping proceedings is provided by section 617* * *." App. A, *infra*, at 9a-10a.

However, as noted, sections 751 and 516A were added by the Trade Agreements Act of 1979 in response to extreme criticism of the Treasury Department's adminis-

tration of the antidumping law. In these two sections, Congress deliberately gave domestic producers and labor interests an unqualified right to participate in the antidumping duty (and countervailing duty) determination process and to obtain judicial review of determinations which they believed were unlawful.

On the other hand, section 617 was never even considered by Congress during its deliberations over the Trade Agreements Act; it was never perceived as an enforcement tool under the antidumping law and was never utilized by the Treasury Department to settle claims arising under the antidumping law.[14] Rather, an examination of the history of section 617 reveals that it had a limited purpose—to maximize the revenues when the collectability of a mature Government claim was in

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[14] *See, e.g.*, letter from the Honorable Charles A. Vanik, Chairman of the Subcommittee on Trade of the House Ways and Means Committee, dated March 28, 1980, to a Commerce Department official, in which the following was stated:

> * * * I would point out that at no time during the consideration of the Trade Agreements Act of 1979 did we contemplate the possibility of granting the administering authority the power to settle claims. On the contrary, many of the amendments made to the dumping law by the Trade Agreements Act clearly demonstrate the Congressional intent to restrict the discretionary authority of the Department of Commerce in administering the law. An unlimited authority to settle claims would nullify the effect of these restrictions.
>
> Absent clear legal authority to settle, any act of compromise could, in my judgment, place the decision maker in a position of extreme personal risk as to his personal liability to those who may be adversely affected by the decision.
>
> For the above reasons, I am opposed to any settlement of dumping duties which takes place outside the purview of a court proceeding. As you will recall from our recent meeting, other members of the Subcommittee join me in this view.

Appendix F to petitioner's petition for rehearing before the Court of Customs and Patent Appeals.

doubt.[15] The ruling of the Court of Customs and Patent Appeals, which permits section 617 to be used as a vehicle for disposing of questions of antidumping duty liability without domestic industry participation or judicial review, is simply incompatible with the recent congressional enactments and should be reviewed by this Court.

2. In determining *sua sponte*, in a non-party's appeal from a discovery order, that the Secretary of Commerce's decision to compromise was not subject to judicial scrutiny, the Court of Customs and Patent Appeals was unaware of most of the massive evidence of bad faith that petitioner had compiled and was uninterested in that which had been brought to its attention. The court's

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[15] Section 617 had its conceptual origin in section 10 of the Act of March 3, 1863, 12 Stat. 737, 740 (subsequently codified as part of Rev. Stat. § 3469). Section 10 was enacted as part of legislation designed to raise and protect the revenues which were needed to finance the cost of the Civil War. *See* Smith, *Customs Valuation in the United States* 102 *et seq.* (1948); Taussig, *The Tariff History of the United States* 154 *et seq.*, *esp.* 160 (8th ed. 1931; 1967 reprint); U.S. Treasury, *Annual Report (1862)* [Sen. Ex. Doc. No. 1, 37th Cong., 3d Sess. 130-38 (1863)]. Specifically, section 10 was enacted "for the better ascertainment and realization of the *value* of claims in the course of collection." 16 Op. Att'y Gen. 617 (1879) (emphasis in original); *see also* 61 Cong. Globe 906 (1863) (remarks of Senator Fessenden); 12 Op. Att'y Gen. 543, 543-44 (1868); 36 Op. Att'y Gen. 40, 55 (1929). The statute was not blanket authority to settle anything which might be loosely called a claim, on any terms whatsoever. *See, e.g.*, 16 Op. Att'y Gen. 384 (1879); 21 Op. Att'y Gen. 361 (1896). Indeed, because of its extreme concern for revenue protection, Congress insisted on separate and independent statements or opinions before the Secretary of the Treasury could compromise a claim. *See United States* v. *George*, 25 Fed. Cas. 1277 (C.C.S.D.N.Y. 1869); 61 Cong. Globe 906 (1863) (colloquy between Senators Grimes and Fessenden).

decision was based on its view that the Secretary's decision to compromise under section 617 was action committed by law to agency discretion and not reviewable since, citing *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), "there is no law to apply."

We believe that the lower court's reliance on the criticized *Overton Park* dictum[16] led to a result which this Court could never have intended and which, because of its importance to administrative law in general, should now be reviewed by this Court. Clearly, this Court has left the door open for judicial review—even in instances where extraordinary discretion has been conferred on an agency—when an agency completely abrogates its enforcement responsibilities or when the agency's decision would be "plainly beyond the bounds of the Act [or] clearly defiant of the Act." *Dunlop* v. *Bachowski*, 421 U.S. 560, 574 (1975).

Here, the actions of the Secretary of Commerce and his advisors have been in clear defiance of the congressional will and have rested on "considerations that Congress could not have intended to make relevant." *See Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 715, 719 (2d Cir. 1966) (Judge Friendly, quoting from an opinion of Judge Learned Hand). Documents from the Government's files and sworn deposition testimony reveal: (a) the Government's continuing

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[16] See, e.g., Davis, *Administrative Law Treatise* § 28.16 (Supp. 1982) at 508 ("The idea that [administrative] action is unreviewable whenever 'there is no law to apply' is contrary to much law that the Supreme Court could not have meant to reject."); *id.* at 512 ("The whole, huge batch of case law that is founded on the 'no law to apply' idea is unsound, contrary to the APA, a barrier to needed judicial review of discretionary action, and overripe for discontinuation.").

nonenforcement of the antidumping law with respect to Japanese television receivers—despite the dumping and injury determinations—and continuing drive to reduce duty liability unlawfully in response to relentless pressure from foreign interests, (b) the orchestration of "Commerce's" settlement by Executive Branch personnel outside the Commerce Department, (c) the deliberate reliance by Government officials on false invoice information in ascertaining antidumping duty and the deliberate understatement of antidumping duty liability by hundreds of millions of dollars in order to justify the settlement amounts, (d) the deliberate inclusion by Government officials of falsehoods in the settlement agreements, and (e) *the willingness of Government officials to engage in devious and deceptive conduct in an effort to accommodate the Japanese interests. See* petition for rehearing before the Court of Customs and Patent Appeals at 12-18 and record references cited therein.

One example of the last point may be found in notes provided by an official of the United States Trade Representative's office to the Commerce Department's General Counsel for the latter's use in secret negotiations with Japanese Government officials over the television dumping case.[17] The notes, which were prepared by an Assistant General Counsel of the Treasury Department during his secret discussions with Japanese officials, reveal that the Japanese manufacturers were very much concerned about being able to reimburse the importers

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[17] These notes were not made a part of the certified administrative record which was filed with the trial court. The Commerce Department official responsible for certifying the record acknowledged at his deposition that the notes should have been included and that the administrative record which was certified as complete was, in fact, incomplete.

for any monies paid as part of any settlement package.[18] Reimbursement of dumping duties has long been recognized as the equivalent of further dumping and has been prohibited by Treasury and Commerce Department practice and regulation. *See, e.g.*, 19 CFR § 353.55 (1981); 19 CFR § 153.49 (1979). The orchestration proposed by the U.S. official to circumvent our law is disclosed in the following excerpt from the notes:

> The MITI representatives then went down a list of specifics about the proposed agreement as follows:
>
> 1. They said that they are still disturbed about the payment of reimbursement by the manufacturer. I told them that I believed the best way by far for this to be done is through a private opinion generated by a lawyer for their use, with Treasury staying out of the matter. I said that my major reason for this perception is the desirability of not flushing this issue at the time the settlement is announced. I said one must realize that the reimbursement will probably be made public eventually, but I said that it would be much easier if it surfaced a month or two after the settlement is announced. At that time, I indicated that Mr. Mundheim [Treasury's General Counsel] would probably be well positioned to respond to a question about reimbursement by saying that he was aware that the manufacturers had a legal opinion saying that such reimbursement is not dumping, and that Mr. Mundheim is of the opinion that they have a sufficiently substantial argument to make it not worth the Treasury's while to pursue the issue with them. I also indicated that I am prepared to attempt to teach Mr. Gartland [an attorney for a

[18] There was also repeated concern that the monies paid not be termed dumping duties (because of pending antitrust litigation brought against the Japanese manufacturers). The settlement agreements reflect that the Japanese interests were accommodated.

Japanese manufacturer] a refined approach to the theory so that he may write such an opinion, and that if that were not possible, I nonetheless thought it important that some lawyer be obtained to write them that opinion. When they asked me what to do about everyone other than Mr. Gartland's client, I said that the way to handle that was to engage Mr. Gartland directly on behalf of MITI and then to take the opinion that he wrote and make it available as MITI's property to the manufacturer.

2. The MITI representatives asked me how one would go about making the reimbursement. I said that I believed it important not to make it public, but equally important, not to take extraordinary efforts to keep it secret. I said that in this manner one would not act as if the payment were wrong, thus causing people to believe the payment is wrong. At the conclusion of this point I explained that if I were in MITI's position I would suggest that each manufacturer write a letter to each of its importers saying the following: "I believe that a settlement by your company would be appropriate in this case on terms similar to those reached by so-and-so. Should you wish to make such a settlement, our company would be prepared to make reimbursement to you. Such payment is not in our opinion dumping because it is made in recognition of the fact that the delay in submitting information in this case may have damaged your company." The MITI representatives seemed to feel that this was a workable approach for them.[19]

Appendix L to petition for rehearing before the Court of Customs and Patent Appeals at L-35—L-37.

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[19] The notes also reflected other improper schemes and proposals (*e.g.*, promises to revoke the dumping finding, to conduct further "verifications" in a potentially ineffective manner, and to refuse to consider certain types of valid evidence of foreign market value).

The foregoing excerpt is offered solely as an example of the abundant evidence pointing to bad faith in the negotiation and execution of the settlement agreements. The rule of law flowing from the opinion below—that such evidence is immaterial and beyond the concerns of the judiciary—is a dangerous one. It is certainly not a rule which has ever been endorsed by this Court and should not be permitted to govern the disposition of this or any other significant trade controversy.

The Court of Customs and Patent Appeals in rendering its *sua sponte* determination on a non-party's appeal from a discovery order simply did not appreciate the complex factual and legal issues which were present in this litigation. That determination warrants this Court's attention. As shown above, the decision of the lower court poses a dangerous precedent of wide import to all domestic industry and labor. Having declared the judiciary to be impotent to consider and correct the flagrant abuses of administrative power revealed in the evidence marshalled in this case, the court below has in effect encouraged such abuses and has deprived adversely affected industries and labor of the redress Congress clearly sought to provide in the Trade Agreements Act of 1979 and the Customs Courts Act of 1980.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1982

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Appeal No. 81-24.

MONTGOMERY WARD & CO., INC.
Appellant,

THE UNITED STATES,
Appellant-Intervenor,

v.

ZENITH RADIO CORPORATION,
Appellee.

DECIDED: March 11, 1982

Before MARKEY, *Chief Judge*, RICH, BALDWIN, MILLER, and NIES, *Associate Judges*.

NIES, *Judge*.

Montgomery Ward & Company (Wards) and the Government as intervenor appeal from an order of the Court of International Trade requiring the Government to disclose to Zenith Radio Corporation (Zenith) a file compiled by the Customs Service during an investigation of Wards for possible violations of 19 USC 1592. We reverse and remand with instructions to dismiss this action for want of jurisdiction.

Background

This proceeding involves review of the discretionary action of the Secretary of Commerce and raises fundamental questions of the separation of powers between the Judicial and Executive Branches of Government. Zenith seeks to overturn a portion of settlement agreements under which the Secretary of Commerce, the Secretary of the Treasury, and the Attorney General compromised claims against 22 importers with respect to dumping duties imposed on these companies pursuant to T.D. 71-76, 5 Cust. Bull. 151 (1971), and civil penalty claims against four of these companies, including Wards, asserted

under 19 USC 1592. Zenith challenges only the legality of the agreements insofar as they relate to dumping duty claims which were not in litigation and which would be settled for approximately $66 million. [1] Zenith alleged two causes of action, the first that the Secretary of Commerce had no authority to settle claims for dumping duties under 19 USC 1617, and a second that, assuming the Secretary had such authority, the settlements were entered into in bad faith. On February 27, 1981, the court below granted the Government's motion for summary judgment on the first cause of action and denied summary judgment on the cause based on "bad faith."

Zenith alleges that the subject settlements are the culmination of years of utter disregard of the law by officials of the Executive Branch who have interfered with and frustrated enforcement of the Antidumping Act, that political considerations motivated the settlement rather than enforcement, that Zenith had no opportunity to be heard concerning the amount of duties which would be assessed, that the settlements violated its procedural rights under § 751 of the Tariff Act of 1930 (19 USC 1675), which was added by the Trade Agreements Act of 1979, and that it is aggrieved by its competitors' unlawful release from payment of hundreds of millions of dollars in dumping duties.

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[1] The Secretary of Commerce acted on behalf of the Government with respect to these claims. The Department of Justice settled the claims upon which actions had been brought for collection of unpaid duty assessments. Zenith does not attack the settlement of these claims by Justice even though settled on the same basis as those not in litigation. The Secretary of the Treasury was responsible for and settled the claims for civil penalities [*sic*] under 19 USC 1592 with respect to false documentation of entries. During the investigation into possible civil and criminal violations, the Government gave guarantees of confidentiality to Wards to avoid grand jury proceedings and Wards turned over a voluminous quantity of its business records under this agreement. It is this entire file (hereinafter "the Wards file") that is now being sought by Zenith.

Zenith asserts that the Government's estimate of $138.7 million as the possible amount of dumping duties which might be collected was low, and that any belief by the officials in the legal weakness of the Government's case against the importers with respect to the Government's method of calculating such duties was unfounded.

Zenith further asserts that the Government of the United States and the Government of Japan entered into a secret side agreement at the time of the Orderly Marketing Agreement entered into between the countries in May 1977 in which the United States agreed to assess dumping duties in conformity with the International Antidumping Code, notwithstanding that the Code differs from our national legislation.

Finally, Zenith asserts that the settlement agreement falsely states that the United States knew of no violation of law relating to or arising from the importation of Japanese television receivers.

Zenith's original complaint, filed June 27, 1980, was based upon rights under section 516A(a)(2) of the Tariff Act of 1930 (19 USC 1516a(a)(2)), and asserted jurisdiction in the court under 28 USC 1581(c). In its amended complaint filed November 3, 1980, it added an allegation that the action was brought pursuant to 5 USC 772 et seq. [sic, the Administrative Procedure Act, 5 USC 702 et seq., hereinafter APA], jurisdiction being conferred by 28 USC 1581(i). [2] However, the remaining allegations of the complaint were unchanged except for minor details and the addition of a specific pleading that it would be adversely affected or aggrieved by the favorable settlement of the claims against its competitors.

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[2] 28 USC 1581(i) was enacted as part of the Customs Courts Act of 1980, Pub. L. No. 96-417, § 301, 94 Stat. 1729, which took effect October 1, 1980.

Discovery Proceedings in the Court of International Trade

On July 2, 1980, Zenith served interrogatories and a request for production of documents upon the Government. The Government moved for an order relieving it of the obligation to respond, urging that judicial review should be limited to the record made by the agency. The court denied that motion on August 20, 1980.

Zenith moved on October 25, 1980, for an order preliminarily enjoining implementation of the settlement agreements. The Government opposed, again moving for an order relieving it of the obligation to respond to discovery.

On December 9, 1980, the court issued an injunction pendent lite, preliminarily enjoining implementation of the settlement agreements, stating that Zenith had "made out a substantial case on the merits of its alternative second [bad faith] cause of action." *Zenith Radio Corp. v. United States*, 1 CIT ____, Slip Op. 80-10, 505 F. Supp. 216, 219 (1980).

On December 12, 1980, the court denied the Government's second motion, holding that Zenith had "made a sufficiently strong showing of bad faith so as to warrant discovery" [3] and directed the Government to respond to Zenith's discovery demands. *Zenith Radio Corp. v. United States*, 1 CIT ____, Slip Op. 80-11, 15 Cust. Bull. & Dec., No. 1, 29 (1980). The administrative record was timely filed on January 27, 1981,

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[3] No findings were made to support the order. The court referred to the showing made by Zenith to obtain a preliminary injunction. The December 9, 1980 order of the court granting that injunction (Slip Op. 80-10) states without particularizing what facts it relied upon:

> Based on these facts which are largely uncontroverted, the court is of the view that plaintiff has made out a substantial case on the merits on its alternative second cause of action . . . .

and, accordingly, had not been reviewed at the time of the court's order of December 12, 1980. [4]

The Government continued to resist production of documents outside the administrative record in connection with its motion for summary judgment and submitted affidavits to overcome Zenith's showing of "bad faith." Zenith moved for an order compelling production. Among the documents sought was the Investigative file compiled by the Customs Service during its § 1592 investigation of Wards (Wards file). Wards was permitted to intervene for the sole purpose of opposing the motion for production of that file.

On May 13, 1981, the court granted Zenith's motion for production, under a protective order. Its motion for reconsideration being denied on June 18, 1981, Wards appealed. On July 7, 1981, this court granted a stay of the May 13, 1981 order.

Positions of the Parties on Appeal

Zenith argues that the subject discovery order is interlocutory and, therefore, not subject to review at this time. Zenith further contends that the court below did not abuse its discretion in going beyond the record and granting discovery

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[4] Section 706 (APA) which is specifically applicable under 28 USC 2640(d), provides:

> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Under *Camp* v. *Pitts*, 411 U.S. 138, 141-43 (1973), it is clear that the starting point for any review must be the administrative record. It is only with the administrative record before the court, supplemented if necessary by affidavits from the appropriate officials, that a decision can be made on the strength of a "bad faith" showing and the necessity for further discovery. *See also Quincy Oil, Inc.* v. *FEA*, 468 F. Supp. 383 (D Mass. 1979).

because of the strength of its showing of bad faith. Zenith maintains that the allegations set out above are strong indicators of bad faith by the Government which justify setting aside the settlement.

It appears that Zenith's theory of "bad faith" stems from a meeting in Honolulu in 1972 between President Nixon and Prime Minister Tanaka of Japan at which trade matters were discussed. [5] Zenith concludes that a secret agreement must have been entered into at that meeting whereby the United States agreed to non-enforcement of U.S. antidumping laws with respect to television sets from Japan in exchange for Japan's increased purchases of U.S. agricultural products. Zenith's conclusion is based on a rumor that the U.S. agreed to "take a dive" on color TV's; Japanese press stories expressing concern over U.S. antidumping laws; newspaper reports that Japan agreed to purchase more U.S. farm products; newspaper reports that trade issues were a high priority at the 1972 meeting; and Department of Agriculture statements encouraging exports to Japan.

Wards' position on appeal is that the court has jurisdiction to review the discovery order; that Zenith's "showing of bad faith" is manifestly insufficient to justify any discovery; that the Wards file is irrelevant to the dumping duty settlement; that the court abused its discretion in not recognizing Wards' private interest and the strong public interest in the continued confidentiality of documents compiled in the Wards file; that Zenith has no standing to challenge the settlement of claims under 19 USC 1592; and that if any discovery should be permitted, the scope of discovery being pursued is greater than can be justified by need or relevance. [6]

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[5] Brief in Support of Plaintiff's Cross-Motion for Partial Summary Judgment on its First Cause of Action and in Opposition to Defendant's Motion to Dismiss, filed October 10, 1980, at 15.

[6] Because we dispose of this case on other grounds, we need not reach Wards' and the Government's arguments concerning the confidentiality of the Wards file or any applicable privilege. See e.g., *Black* v. *Sheraton Corp. of America*, 564 F.2d 550 (CA D.C. 1977).

The Government was permitted to intervene in this appeal in support of appellant Wards. In addition to endorsing Wards' views, the Government asserts that, this appeal being properly before this court, we possess jurisdiction to review the merits of the trial court's decision to allow Zenith to conduct discovery; that the discovery permitted expands the parameters of judicial review of agency action as defined in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), and *Camp* v. *Pitts*, 411 U.S. 138 (1973); that the court's ordering discovery without review of the administrative record and without an explanation of its reasons for accepting Zenith's "flimsy" allegations was manifest error; that a non-party to a settlement agreement has no standing to challenge its merits and, in particular, Zenith has no special interest in the settlement of the § 1592 claims; and, finally, that the order violates the Executive privilege.

OPINION

I

In this appeal, Wards properly focuses on the validity of the discovery order with respect to the Wards file, Wards not being a party to the proceeding below. However, we agree with the Government that if an appeal by Wards lies in this court with respect to the discovery order, this court may properly, indeed must, review the authority underlying the discovery order, where fundamental jurisdictional questions have been raised with respect to Zenith's standing and the permissible scope of judicial review. [7]

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[7] In any case properly before it for appellate review, an appellate court is obliged to notice want of jurisdiction in the court below sua sponte if not raised by a party, *Louisville & N.R. Co.* v. *Mottley*, 211 U.S. 149 (1908); *Cameron* v. *Hodges*, 127 U.S. 322 (1888); *Mansfield, C&L.M. Ry* v. *Swan*, 111 U.S. 379 (1884), and may, in any event, assume jurisdiction for the limited purpose of determining jurisdiction. *United States* v. *United Mine Workers*, 330 U.S. 258, 289-95

Accordingly, we first determine whether this appeal is properly before this court.

II

Appealability of Discovery Order

Citing a long line of cases including *Arthur Andersen & Co.* v. *Finesilver*, 546 F.2d 338, 341-42 (CA 10 1976), *cert. denied*, 429 U.S. 1096 (1977), and *N.C. Asso. of Black Lawyers* v. *N.C. Board of Law Examiners*, 538 F.2d 547, 548-49 (CA 4 1976), Zenith argues that the subject discovery order is interlocutory and thus not appealable as a matter of right. Acknowledging that an interlocutory order may be considered final in some circumstances, Zenith says Wards' arguments for finality are neither collateral to the underlying litigation [8] nor based on a recognized privilege against disclosure.

Interlocutory discovery orders are normally not appealable. Courts have recognized, however, an exception where, as here, the information sought is in custody of a third party and the putative appellant can neither resist nor force the custodian to resist compliance with the discovery order. *See*, e.g.,

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(1947). Also, while parties are not necessarily entitled to a hearing on this issue, *see*, e.g., *Kamsler* v. *Zaslawsky*, 355 F.2d 526 (CA 7 1966), we view the arguments concerning scope of review sufficient to call into question the jurisdiction of the court below. Indeed, where "[t]he questions [Zenith] presents are outside the narrow scope of review permitted . . . we must dismiss for want of jurisdiction." *Carter* v. *Cleland*, 643 F.2d 1, 2 (CA D.C. 1980). *See also Garcia* v. *Neagle*, 660 F.2d 983 (CA 4 1981).

[8] The "Collateral Order" doctrine, established in *Cohen* v. *Beneficial Ind. Loan Corp.*, 337 U.S. 541 (1949), permits an interlocutory order to be deemed a final order for the purpose of appellate review where, inter alia, the order is based on a claim separable from, and collateral to, the rights asserted in the underlying cause of action. *Id.* at 546-47.

Perlman v. *United States*, 247 U.S. 7, 12-13 (1918); *In re Berkley & Co.*, 629 F.2d 548, 551 (CA 8 1980); *In re Matter of Grand Jury Applicants, C. Schmidt & Sons.*, 619 F.2d 1022, 1024-25 (CA 3 1980); *United States* v. *RMI Corp.*, 599 F.2d 1183, 1186-87 (CA 3 1979). In such circumstances, denial of an appeal precludes all opportunity for review, unlike the normal discovery situation in which compliance can be refused and the order challenged on appeal from a resulting contempt finding.

Contrary to Zenith's argument, the courts have not limited interlocutory appeals of discovery orders to those involving assertions of absolute or constitutional privileges. Indeed, appeals have been permitted when based on an interest in continued confidentiality of business records. *See*, e.g., *United States* v. *RMI Corp.*, supra.

That Wards does not assert an absolute privilege is thus irrelevant to the issue of whether the subject order is appealable. Wards has no power to compel Government acceptance of a contempt citation in protection of its confidential business information. That inability, coupled with Wards' interest in continued confidentiality of its information, is sufficient to confer a right of appeal. Though Zenith distinguishes *RMI*, supra, saying that the discovery order there permitted disclosure to competitors and was not limited, as here, to opposing counsel, we are not persuaded that that distinction alone renders the present order non-final. A contrary view, by totally defeating Wards' opportunity for review, would conflict directly with the Court's rationale in *Perlman*, supra.

Having concluded that the appeal now before us is proper, we turn to the reasons for our holding that the court below lacks jurisdiction in this case.

III

Statutory Authority for Settlement

Consideration must first be given to the pertinent statute governing the Secretary's action. The authority for settlement

of antidumping proceedings is provided by section 617 of the Tariff Act of 1930, as amended (19 USC 1617), which states:

> Upon a report by a customs officer, United States Attorney [*sic*] or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of [*sic*] recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claims [*sic*], if such action shall be recommended by the General Counsel for the Department of the Treasury.

The responsibility for administration of the antidumping laws was transferred from the Secretary of the Treasury to the Secretary of Commerce by Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69273 (1979), including, specifically, the authority to compromise claims under § 1617 (§ 5(a)(1)(G)). [9]

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[9] The Secretary of Commerce received the aforesaid powers of the Secretary of the Treasury and of the General Counsel. By notice dated April 28, 1980, which partially delegated this authority, the Secretary of Commerce stated:

> I shall as Secretary of Commerce retain and exercise all authority under law to decide any compromises of claims existing under T.D. 71-76.
>
> 2. I hereby delegate to the General Counsel of the Department of Commerce the authority to recommend any compromises of claims arising under the customs law, as provided in 19 U.S.C. 1617 and transferred to the Secretary under the aforesaid Reorganization Plan and Executive Order. This authority shall apply in the matter of claims under T.D. 71-76, and any subsequent matters arising under 19 U.S.C. 1617.

45 Fed. Reg. 29623 (1980).

IV

Jurisdiction of Court Below to Review Settlement

a.

We find no basis for review under 28 USC 1581(c) and 19 USC 1516a arising by Zenith's attack on the settlement agreement under 19 USC 1675. [10] 19 USC 1516a provides for judicial review of certain "determinations," including those made under § 1675. Such "determinations" must be made in accordance with delineated procedures and must be based on specific factual findings and legal conclusions. Thus, the merits of a determination, as well as its procedural correctness, are subject to judicial review. A settlement agreement is not an administrative review of an antidumping order resulting in a "determination" under 19 USC 1675. Unlike a "determination," the Government may not impose a settlement agreement as of right. Moreover, the basis for a decision to settle cannot be supported by factual findings or legal conclusions which indicate that the decision to accept a particular amount or particular terms in satisfaction of a disputed claim is or is not correct. [11] Finally, Zenith does not assert and we do not see any

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[10] Under 19 USC 1675, existing antidumping orders are reviewable by the administering authority. Whenever a review is conducted, any interested party is entitled to a hearing and may contest the underlying factual findings or legal conclusions by suit against the Government in the Court of International Trade. Zenith does not assert that it was denied any rights in connection with the issuance of T.D. 71-76 or subsequent administrative review procedures. Moreover, T.D. 71-76 is neither negated nor revoked in whole or in part by the settlement. It continues in effect and is currently operative.

[11] The correctness of a settlement agreement is, of course, properly subject to review by the appropriate oversight committees of the Congress; and if a violation of criminal law is suspected, the matter is properly within the jurisdiction of the United States Department of Justice.

basis for asserting that settlement comes within any of the other statutory categories of reviewable "determinations" set forth in § 1516a. Therefore, while the statute provides under 1516a a right of review to certain persons "aggrieved or adversely affected" by "determinations" as specified therein, we hold that the Court of International Trade has no jurisdiction under 28 USC 1581(c) to review a settlement agreement.

b.

Zenith's alternative basis for review by the Court of International Trade, 28 USC 1581(i), provides in pertinent part:

> [T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> * * *
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

This section must be read in conjunction with 28 USC 2631(i):

> Any civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)-(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5.

and 28 USC 2640(d):

> In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5.

The purpose of 28 USC 1581(i) is shown in the legislative history as follows:

> This section [1581(i)] granted the court jurisdiction over those civil actions which arise directly out of an import transaction and involve one of the many international trade laws. The purpose of this section was to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the federal district courts and the Court of International Trade. This language made it clear that all suits of this type are properly commenced only in the Court of International Trade and not in a district court. Thus, the Committee did not intend to create any new causes of action, but merely to designate definitively the appropriate forum.
>
> * * *
>
> However, subsection (i), and in particular paragraph (4), makes it clear that the court is not prohibited from entertaining a civil action relating to an antidumping or countervailing duty proceeding so long as the action does not involve a challenge to a determination specified in section 516A of the Tariff Act of 1930. [12]

Thus, we have no doubt that Congress intended that the Court of International Trade, and not a district court, have jurisdiction of civil actions for review of administration and enforcement of the antidumping statute to the extent appropriate under the APA.

Where jurisdiction is asserted under 1581(i), the court must not accept the allegations at face value but must determine the thrust of the complaint. *Royal Business Machines, Inc.* v. *United States*, No. 81-12 (CCPA January 21, 1982). Jurisdiction under 1581(i) cannot be made a resting ground for judicial review of activities neither contemplated nor permitted by Congress.

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[12] H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 33, 48, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3729, 3745, 3760.

With respect to discretionary acts of the Executive, *United States* v. *Morgan*, 313 U.S. 409 (1941), and other authority discussed herein indicate that the extent of permissible judicial review, that is, a court's jurisdiction, varies with the statutory grant to the Executive. [13] In summary, if action is committed by law to the discretion of the Executive, no review is permitted. If action is committed by law to discretion but procedural requirements are imposed, the satisfaction of procedural requirements, but only these, may be judicially reviewed. If an action is discretionary but there is law from which a court may determine that the exercise of discretion is arbitrary, capricious, or not in accordance with law, the decision itself may be reviewed on that limited basis. For reasons to be discussed, we conclude that the scope of judicial review with respect to the subject settlement agreement is limited to determining whether procedural requirements have been satisfied.

Scope of Review

Review of agency action is authorized under 5 USC 702 as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

No specific statutory right is provided for judicial review of the merits of a settlement pursuant to 19 USC 1617. However, the Supreme Court in *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968), indicated that no explicit provisions for review may be necessary in some instances. "[W]hen the particular statutory provision invoked [that is, alleged to be violated] does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision." *Id.* at 6.

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[13] *See* n. 7, supra.

Zenith asserts that the legislative purpose of the Antidumping Act is to protect domestic industry, in this case the particular interests of Zenith. The thrust of its complaint, that is, the alleged "legal wrong", is that the settlement is part of an alleged course of conduct by the Government of nonenforcement of the law for many years. It characterizes the settlement as the "culmination" of nonenforcement in that its competitors have been released from payment of hundreds of millions of dollars in duties.

The premise of Zenith is untenable. Settlement is a tool of enforcement of the law, here specifically granted to the Secretary of Commerce in conjunction with the transfer to him of responsibility for enforcement of the Antidumping Act. Accepting Zenith's position would deprive the Secretary of any power to settle these claims without Zenith's consent as well as the consent of others in the industry. 19 USC 1617 contains no such limitation.

In enforcing the law the Secretary is not providing a private remedy but acting in the public interest. *See Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265 (1940). It is for the Secretary, not the Court of International Trade, to determine that the overall purposes of the Act are best served by the terms of a settlement. Thus, the frustration of Zenith's desire that its competitors pay a greater sum in dumping duties than the settlement provides is not a "legal wrong" resulting from "agency action" of which courts can take cognizance. *See FTC* v. *Standard Oil of California*, 449 U.S. 232, 247-49 (1980), (Stevens, J., concurring).

In no previous case has a court assumed jurisdiction at the behest of a third party to review the merits of a settlement agreement entered into by the Government with its competitor. The only precedent we find for setting aside a settlement is where the court has found that the complainant was deprived of its statutory right to a hearing on the merits of the underlying case prior to settlement. *See International Bro. of Teamsters* v. *NLRB*, 339 F.2d 795 (CA 2 1964), and cases cited

therein. This is in accord with the directive of the Supreme Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), that discretionary action cannot be reviewed if "there is no law to apply." *Id.* at 410. *See also Santa Clara* v. *Andrus*, 572 F.2d 660, 668 (CA 9), *cert. denied*, 439 U.S. 859 (1978); *Ness Invest. Corp.* v. *USDA*, 512 F.2d 706, 715-16 (CA 9 1975). No situation is more within the category of "no law to apply" than the multifaceted judgmental decision to settle a claim. Thus, the substance of the settlement is clearly outside the scope of judicial review. The only law to apply here is set forth as procedural requirements in 19 USC 1617, and any legal wrong to Zenith must be based on the Secretary's violation of the procedures set forth therein.

Zenith does not dispute that the procedures set out in 19 USC 1617 were followed [14] but asks the court to find that the procedures of 19 USC 1675 are superimposed, thus giving it a right to a hearing which it says would encompass the terms of settlement. We see no reasonable basis for placing such a limitation on the Secretary's authority under the statute and conclude there is none. This conclusion is in accord with the recent decision of the Supreme Court in *Watt* v. *Energy Action Education Foundation*, 50 USLW 4031 (December 1, 1981) (No. 80-1464), where the Court refused to restrain the Secretary of the Interior's discretion in connection with experimentation in awarding offshore oil rights by resort to another statute which laid out criteria for the program generally.

Similarly here, the challenge to the Secretary's action must be directed to 19 USC 1617 exclusively. Under 19 USC 1617, Zenith was not entitled to a hearing or to be consulted regarding the considerations entering into the terms accepted by the Secretary in settlement of these claims. Its right of participation ended with the issuance of T.D. 71-76 (except as provided

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[14] 19 USC 1617, quoted supra, requires only a report of an appropriate Customs official and a recommendation of the General Counsel.

under 19 USC 1675 discussed supra). Thus, Zenith has no grounds for asserting that its procedural rights to a fair hearing were denied, unlike the plaintiffs in the authority cited in the opinion of the court below. *See*, e.g., *Singer Sewing Machine Co.* v. *NLRB*, 329 F.2d 200 (CA 4 1964); *Ruppert* v. *Washington*, 366 F. Supp. 686 (D.D.C. 1973), *aff'd*, 543 F.2d 417 (CA D.C. 1976); *Jarrott* v. *Scrivener*, 225 F. Supp. 827 (D.D.C. 1964).

Zenith would also have us look behind the apparent regularity of the procedures into the motives for settlement. In *United States* v. *Morgan*, supra, 313 U.S. at 421-22 *(Morgan IV)* the Supreme Court stated:

> And so we conclude that the order of the Secretary furnishes "the appropriate basis for action in the district court in making distribution of the fund in its custody." *United States* v. *Morgan*, 307 U.S. 183, 198. But, finally, a matter not touching the validity of the order requires consideration. Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." *Morgan* v. *United States*, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, *compare Fayerweather* v. *Ritch*, 195 U.S. 276, 306-07, so the integrity of the administrative process must be equally respected. *See Chicago, B. & Q. Ry. Co.* v. *Bab-*

> *cock*, 204 U.S. 585, 593. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. *United States* v. *Morgan*, 307 U.S. 183, 191.

In an earlier stage of the litigation, *Morgan* v. *United States*, 304 U.S. 1 (1938), in order to resolve whether there had been *procedural irregularities*, that is, whether there had been a hearing as required by law, examination of the Secretary and receipt of other evidence had been permitted. But in *Morgan IV* the Court clearly rejected the argument that probing into reasoning or motivation was appropriate as part of a procedural inquiry.

These same principles must be applied in this case. At most, Zenith may press inquiry into whether the statutory procedural requirements for settlement were satisfied. *See Watt* v. *Energy Action Education Foundation*, supra; *Sneaker Cicus* [*sic*], *Inc.* v. *Carter*, 566 F.2d 396 (CA 2 1977). It may not, however, be allowed to inquire into the merits of the settlement or into the Secretary's mental processes in deciding upon settlement in the guise of a challenge to procedure. Zenith's requests for discovery bear out that this is its objective. [15] The request for the Wards file bears on what figures the Secretary may have considered in arriving at settlement. Proving that the estimate in the report to him was lower than what Zenith considers reasonable does not destroy the lawfulness of his decision. Currency fluctuations can play a role in evaluation. Moreover, the dollar amount agreed upon may have been the best figure which could be negotiated regardless of the size of the claim. In any event, it may well be that other considerations were of greater significance than the precise dollar

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[15] Zenith has previously requested: documents of and/or concerning Admiral Bobby Inman, Acting Director of the CIA; State Department documents; Special Trade Representative documents; and the Presidential papers of Presidents Nixon, Ford, and Carter.

amount of the Government claims. The settlement agreement required more from the importers than the payment of money. Not only were any possible challenges to the assessment of duties expressly waived, but also concessions were obtained requiring cooperation in submitting data and information with respect to future enforcement. A tremendous backlog of cases was inherited by the Secretary which may well have interfered with current work of his Department not only in this area but in all areas of his responsibility under the Act. We do not know what weight he gave to each of these considerations [16] and, in any event, these are not matters for which the court may demand answers. To require an explanation for this type of discretionary Executive action fundamentally changes the nature and scope of judicial review. Moreover, a court cannot infer fraud or bad faith because the Secretary did not achieve as advantageous a settlement as the court may believe could have been made. Nor is it appropriate to infer bad faith in the Secretary's decision from the alleged transgressions of predecessors. The decision to settle under attack here was required to be and was the personal decision of the Secretary. *See* note 9 supra. Zenith includes in its complaint no more than perfunctory allegations of impropriety in the actions by the Secretary and his advisors. [17]

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[16] As the Court of Claims has noted in *Pennsylvania* v. *United States*, 643 F.2d 758, 764, *cert. denied*, 50 USLW 3246 (October 6, 1981) (No. 80-1978):

> The true liability that a lawsuit poses is rarely susceptible of precise quantification prior to final judgment. Both parties in litigation may encounter unforeseen difficulties of proof. The skill of opposing counsel and the resources each side can devote to the conflict may be additional unknowns. Moreover, no party can be precisely certain of the interpretation the trier of fact will give to either the facts or the law. All of these factors are difficult to quantify . . . .

[17] It is also apparent from the record which has been subsequently developed that Zenith is unable or unwilling to add any substance to its charges against these officials. In answer to the Government interrogatory asking Zenith to state the basis of the allegation that:

The admonition of Judge Tamm in *Hercules, Inc.* v. *EPA*, 598 F.2d 91, 123 (1978), is appropriate here:

> The speculative possibility that the Administrator accepted the staff view, not because he was persuaded by the evidence, but for some improper reason, fails to overcome the strong presumption of regularity. To accept petitioner's invention to pierce the presumption on this basis would be to alter radically the nature of judicial review.

The Zenith complaint is manifestly not directed to correction of procedural irregularity. It does not seek to have the settlement set aside until the requirements of 19 USC 1617 are properly met. Rather it seeks through the power of the court to prevent settlement.

We hold that such an action is not within the jurisdiction of the court under 28 USC 1581(i).

CONCLUSION

The order appealed from is *reversed* and this case is *remanded* to the Court of International Trade with directions to dismiss this action for lack of jurisdiction.

REVERSED AND REMANDED

> [N]either the Secretary of Commerce in deciding to settle the alleged claims nor those Government officials who had the statutory responsibility to recommend settlement exercised the independent judgment contemplated by Congress in enacting section 617.

Zenith's response was:

> Objection. This interrogatory calls for the premature disclosure of plaintiff's evidence. Considering the nature of plaintiff's allegations in this action, it would unduly prejudice plaintiff's discovery efforts and trial preparation to answer this interrogatory at such an early point in the pretrial proceedings.

When required to answer under court directive, Zenith merely referred to conclusory statements made in various of its own briefs or motions.

Slip Op. 81-44

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: HON. HERBERT N. MALETZ, JUDGE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Order
Dated: May 13, 1981

Upon consideration of plaintiff's motion to compel defendant to respond to plaintiff's first interrogatories, plaintiff's motion to compel defendant to respond to plaintiff's first request for production of documents, and defendant's opposition to those motions, and upon consideration of defendant's motion to compel plaintiff to respond to defendant's first interrogatories, defendant's motion to compel plaintiff to respond to defendant's first request for production of documents, and plaintiff's opposition to those motions, and upon all other papers and proceedings, after oral argument, the Court makes the following rulings:

I. On Plaintiff's Motion to Compel

A. Documents Relating To Investigation Into Possible Violations Of 19 U.S.C. 1592.

(1) Within 30 days, defendant shall make available, subject to the protective provisions contained in Part IV of this order, the documents covered by plaintiff's first request for production of documents concerning Sears, Montgomery Ward, and White Stores.

(2) Plaintiff will make application within 15 days to the United States District Court for the Eastern District of Virginia for an order modifying that court's protective order entered on April 23, 1980, in *In Re 1978 Grand Jury Proceedings J.C. Penney Company, Inc.*, and authorizing the defendant to make available to plaintiff's counsel for use in this judicial proceeding, subject to the protective provisions of Part IV of this Order, all documents in the defendant's possession which are at present subject to the aforesaid district court's order of April 23, 1980.

(3) Acting Commissioner Archey's claim of privilege for the remaining penalty documents is denied without prejudice on the ground that the privilege has not been properly claimed.

(4) Acting Commissioner Archey is allowed 30 days within which to file a proper claim of privilege for each of such penalty documents and to transmit to the court within that time for examination by the court in camera each document for which privilege is claimed.

B. Other Documents With Respect To Which Defendant Has Claimed A Privilege.

(1) Defendant shall transmit to the court within 15 days for examination by the court in camera the two in camera affidavits referred to in the affidavit of Admiral Bobby Inman, the Acting Director of the Central Intelligence Agency.

(2) The State Department documents for which a claim of privilege has been made by the Secretary of State shall be transmitted to the court within 15 days for examination by the court in camera.

(3) The Special Trade Representative documents for which a claim of privilege has been made shall be transmitted to the court within 15 days for examination by the court in camera.

C. Presidential Papers.

Plaintiff's motion for discovery of the Presidential papers of Presidents Nixon, Ford and Carter is denied without prejudice.

D. Other Documents Encompassed Within Plaintiff's First Request For Production Of Documents.

Defendant shall within 30 days make available for discovery, pursuant to the protective provisions contained in Part IV of this Order, the remaining documents covered by plaintiff's first requests for discovery. Draft protest decisions shall be included among the documents thus made available.

E. Plaintiff's First Interrogatories.

Defendant shall within 30 days supply answers to plaintiff's first interrogatories.

II. On Defendant's Motion To Compel

Defendant's motion to compel discovery pursuant to its first request for production of documents and its first interrogatories is allowed, with the exception of those interrogatories and documents covering communications between plaintiff and members of Congress. The court is of the view that at this stage the relevance of such communications seems borderline and the burden of complying unduly great. See 4 Moore's Federal Practice, pp. 26-135. Accordingly, the court sustains the objection of discovery of such communications without prejudice. With the foregoing exception, plaintiff shall respond to defendant's first interrogatories and request for production of documents within 30 days.

III. The Time Periods Specified Above May Not Be Extended Except For Good Cause Shown.

IV. Protective Provisions

a. All of the information contained in the documents shall be deemed to be protected information. Should plaintiff's counsel believe that a particular document or item contained in a document is not entitled to confidential treatment, plaintiff's

counsel shall not disclose the document or item and shall consult with defendant's counsel. If defendant's counsel agrees that the document or item does not appear to be confidential, plaintiff's counsel shall not disclose the document or item for three business days after receipt of the opinion of defendant's counsel so as to permit the individual or entity which submitted the document to apply for intervention for the purpose of filing an objection to disclosure with the Court. If such an application is filed, plaintiff's counsel shall not disclose the document or item until the Court rules upon the application and the objection. If defendant's counsel objects to, or fails to respond in a timely manner to plaintiff's counsel's request for disclosure of the document or the item, plaintiff's counsel shall not disclose the document or item until the differences between plaintiff's and defendant's counsel have been resolved by the Court.

b. Plaintiff's counsel may disclose the protected information to their legal associates and office personnel actively assisting in the litigation, but shall not disclose the protected information, directly or indirectly, to anyone else, except as provided by this Order.

c. If, in the opinion of plaintiff's counsel, it becomes necessary to consult with experts in evaluating the protected information, they shall, before any disclosure, notify and obtain the consent of defendant's counsel to disclosure to identified experts who shall agree not to disclose what they learn from the documents containing the protected information; if after seven (7) days following notification of defendant's counsel, counsel for the respective parties cannot agree upon the need for an expert or upon a suitable expert, plaintiff's counsel may submit the matter to the Court for resolution.

d. Any persons obtaining access to such protected information shall not make copies or reveal the contents of the documents containing the protected information, or use the protected information obtained for any purpose other than for the purpose of this litigation. Nothing in this Order shall preclude disclosure of the documents or the protected information con-

tained in them to an individual or entity which was the source of the information.

e. Henceforth, should any party to this case file with the Court any document containing information which is protected by this Order, either (1) directly pursuant thereto, or (2) by incorporation through separate agreement between the parties, said party shall request the Clerk of the Court, or an employee of his office, to seal said document and to restrict access thereto to counsel for the parties and the Court personnel authorized access thereto by the Court.

f. The party filing such document as described in paragraph e, *supra*, will, unless there is no unprotected material which is reasonably segregable from the protected information, in addition to filing the number of such documents as prescribed by the Rules of the United States Court of International Trade, file an additional copy of the document, with the protected information deleted, for inclusion in that part of the Court file to which the general public has access.

g. Any party filing a document containing protected information shall indicate conspicuously thereon that the document contains information protected by a protective order.

h. Any party filing a copy of a document, with protected information deleted from said copy, in accordance with paragraph f, *supra*, shall indicate conspicuously on said copy that certain protected information has been deleted therefrom and where such deletions have been made on the copy.

i. Should a request for the sealing of a document, as described in paragraph e, *supra*, be made of the Clerk of the Court or of an employee of his office, such request shall be honored.

j. Upon conclusion of this litigation, Mr. Ikenson and Mr. Curtis shall return to defendant's counsel all documents, then in Mr. Ikenson's and Mr. Curtis' possession, containing protected information and any copies made of such documents, including any documents or copies held by persons authorized

under paragraphs a and b, *supra*, to have access thereto, except for copies which contain work notes of counsel for plaintiff or other authorized persons. These latter documents shall be destroyed. Mr. Ikenson may retain one copy of all briefs and other documents filed by or with the Court which contain protected information.

k. Nothing in this Order shall preclude the parties from seeking such further orders of the Court as may be necessary to provide for further sealing and/or opening for public inspection of any documents or other things covered by this Order.

/s/ Herbert N. Maletz
Judge

New York, New York

May 13, 1981

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

MONTGOMERY WARD & CO., INCORPORATED,

Intervenor for Limited Purpose.

Order

Upon consideration of intervenor's motion (a) for reconsideration of this court's order of May 13, 1981 granting plaintiff's motion to compel discovery of the defendant's files concerning its investigation of intervenor pursuant to 19 U.S.C. § 1592 and (b) in the alternative, for a stay pending appeal of the aforesaid order, upon consideration of plaintiff's memorandum in opposition thereto, and upon all other papers and proceedings had herein, it is hereby ordered:

1. That intervenor's motion for reconsideration is denied; and

2. That intervenor's motion in the alternative for a stay pending appeal is denied.

/s/ Herbert N. Maletz,
HERBERT N. MALETZ, Judge

June 18, 1981

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Appeal No. 81-24.

MONTGOMERY WARD & CO., INC.

Appellant,

THE UNITED STATES,

Appellant-Intervenor,

v.

ZENITH RADIO CORPORATION,

Appellee.

ON PETITION FOR REHEARING

Before MARKEY, Chief Judge, RICH, BALDWIN, MILLER, and NIES, Associate Judges.

Order

Appellee's Petition for Rehearing, Amici's Brief in Support, and Appellant's and Appellant-Intervenor's Responses thereto having been considered, the petition is granted to the extent that the court's opinion of March 11, 1982, is modified by inserting the following footnote "1.1" with the signal to follow "bad faith" in line 12, page 2 of the slip opinion:

[1.1] The thrust of Zenith's first cause of action is found in the following paragraphs of its complaint:

> 29. Section 617 of the Tariff Act of 1930, as amended (19 U.S.C. § 1617) does not provide any authority for the settlement of the alleged claims related to the importation of television receivers from Japan, for the avoidance of the procedures specified by Congress in section 751 of the Tariff Act of 1930, relating to the determination and assessment of antidumping duties on entries subject to findings of dumping, and for the avoidance of the assessment of antidumping duties in accordance with the statutory command of the antidumping provisions of the law.

30. The subject settlement constitutes an unlawful attempt by officials of the United States Government (a) to deprive the plaintiff of the opportunity to be heard before substantive determinations involving the amounts of antidumping duties to be assessed on merchandise subject to an existent dumping finding were made, (b) to deprive the plaintiff of the right of judicial review over such determinations, and (c) to oust this Court of jurisdiction to review such determinations, which opportunity to be heard, which right to judicial review, and which jurisdiction were clearly conferred by Congress in the Trade Agreements Act of 1979.

General allegations that "determinations" were not made or were improperly made are incorporated into both causes of action.

The petition for rehearing is, in all other respects, denied. Appellee's motion for oral argument on its Petition is also denied.

FOR THE COURT

/s/ Howard T. Markey
HOWARD T. MARKEY
Chief Judge

Date: May 13, 1982

MILLER, Judge, would grant rehearing.

Statutes Involved

Section 201(a) of the Antidumping Act of 1921, as amended (19 U.S.C. § 160(a) (1970) (amended 1975; repealed 1979)):

Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160 to 171 of this title called a "finding") of his determination and the determination of the said Commission. For the purposes of this subsection, the said Commission shall be deemed to have made an affirmative determination if the Commissioners of the said Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers.

Section 201(c) of the Antidumping Act of 1921, as amended (19 U.S.C. § 160(c) (1970) (amended 1975; repealed 1979)):

The Secretary, upon determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and the United States Tariff Commission, upon making its determination under subsection (a) of this section, shall each publish such determination in the Federal Register, with a statement of the reasons therefor, whether such determination is in the affirmative or in the negative.

Section 202(a) of the Antidumping Act of 1921, as amended (19 U.S.C. § 161(a) (1970) (repealed 1979)):

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160 of this title, entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated, and as to which no appraisement has been made before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

Section 516A of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a):

(a) Review of determination

(1) Review of certain determinations

(A) Thirty-day review

Within 30 days after the date of publication in the Federal Register of notice of—

(i) a determination by the Secretary or the administering authority, under section 1303(a)(3), 1671a(c), or 1673a(c) of this title, not to initiate an investigation,

(ii) a determination by the administering authority or the Commission, under section 1675(b) of this title, not to review an agreement or a determination based upon changed circumstances, or

(iii) a negative determination by the Commission, under section 1671b(a) or 1673b(a) of this title, as to whether there is reasonable indication of material injury, threat of material injury, or material retardation,

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(B) Ten-day review

Within 10 days after the date of publication in the Federal Register of notice of—

(i) a determination by the administering authority, under section 1671b(c) or 1673b(c) of this title, that a case is extraordinarily complicated, or

(ii) a negative determination by the administering authority under section 1671b(b) or 1673b(b) of this title,

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(2) Review of determinations on record

(A) In general

Within thirty days after the date of publication in the Federal Register of—

(i) notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B), or

(ii) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B),

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days

thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(B) Reviewable determinations

The determinations which may be contested under subparagraph (A) are as follows:

(i) Final affirmative determinations by the Secretary and by the Commission under section 1303 of this title, or by the administering authority and by the Commission under section 1671d or 1673d of this title.

(ii) A final negative determination by the Secretary, the administering authority, or the Commission under section 1303, 1671d, or 1673d of this title.

(iii) A determination, other than a determination reviewable under paragraph (1), by the Secretary, the administering authority, or the Commission under section 1675 of this title.

(iv) A determination by the administering authority, under section 1671c or 1673c of this title, to suspend an antidumping duty or a countervailing duty investigation.

(v) An injurious effect determination by the Commission under section 1671c(h) or 1673c(h) of this title.

(3) Procedures and fees

The procedures and fees set forth in chapter 169 of title 28 apply to an action under this section.

(b) Standards of review

(1) Remedy

The court shall hold unlawful any determination, finding, or conclusion found—

(A) in an action brought under paragraph (1) of subsection (a) of this section, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or

(B) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

(2) Record for review

(A) In general

For the purposes of this subsection, the record, unless otherwise stipulated by the parties, shall consist of—

(i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and

(ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

(B) Confidential or privileged material

The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

(c) Liquidation of entries

(1) Liquidation in accordance with determination

Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the

administering authority of a notice of a decision of the United States Court of International Trade, or of the United States Court of Customs and Patent Appeals, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.

(2) Injunctive relief

In the case of a determination described in paragraph (2) of subsection (a) of this section by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

(3) Remand for final disposition

If the final disposition of an action brought under this section is not in harmony with the published determination of the Secretary, the administering authority, or the Commission, the matter shall be remanded to the Secretary, the administering authority, or the Commission, as appropriate, for disposition consistent with the final disposition of the court.

(d) Standing

Any interested party who was a party to the proceeding under section 1303 of this title or subtitle IV of this chapter shall have the right to appear and be heard as a party in interest before the United States Court of International Trade. The party filing the action shall notify all such interested parties of the filing of an action under this section, in the form, manner, style, and within the time prescribed by rules of the court.

(e) Liquidation in accordance with final decision

If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Customs and Patent Appeals—

(1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

(2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,

shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

(f) Definitions

For purposes of this section—

(1) Administering authority

The term "administering authority" means the administering authority described in section 1677(1) of this title.

(2) Commission

The term "Commission" means the United States International Trade Commission.

(3) Interested party

The term "interested party" means any person described in section 1677(9) of this title.

(4) Secretary

The term "Secretary" means the Secretary of the Treasury.

Section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. § 1675(a)):

Periodic review of amount of duty

(1) In general

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of

this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net subsidy or margin of sales at less than fair value involved in the agreement,

and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

(2) Determination of antidumping duties

For the purpose of paragraph (1)(B), the administering authority shall determine—

(A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and

(B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.

The administering authority, without revealing confidential information, shall publish notice of the results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

Section 751(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1675(d)):

Hearings

Whenever the administering authority or the Commission conducts a review under this section it shall, upon the request of any interested party, hold a hearing in accordance with section 1677c(b) of this title in connection with that review.

Section 771(9) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677(9)):

Interested party.—The term "interested party" means—

(A) a foreign manufacturer, producer, or exporter, or the United States importer, of merchandise which is the subject of an investigation under this subtitle or a trade or business association a majority of the members of which are importers of such merchandise,

(B) the government of a country in which such merchandise is produced or manufactured,

(C) a manufacturer, producer, or wholesaler in the United States of a like product,

(D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product, and

(E) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States.

Section 617 of the Tariff Act of 1930, as amended (19 U.S.C. § 1617):

Compromise of government claims by Secretary of Treasury

Upon a report by a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery

and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

Section 106(a) of the Trade Agreements Act of 1979 (Pub. L. No. 96-39, 93 Stat. 144, 193 (1979)):

REPEAL OF OLD LAW.—The Antidumping Act, 1921 (19 U.S.C. 160 et seq.) is hereby repealed but findings in effect on the effective date of this Act, or issued pursuant to court order in an action brought before that date, shall remain in effect, subject to review under section 751 of the Tariff Act of 1930.

Section 1002(b)(3) of the Trade Agreements Act of 1979 (Pub. L. No. 96-39, 93 Stat. 144, 307 (1979)):

CERTAIN COUNTERVAILING AND ANTIDUMPING DUTY ASSESSMENTS.—The amendments made by this title shall apply with respect to the review of the assessment of, or failure to assess, any countervailing duty or antidumping duty on entries subject to a countervailing duty order or antidumping finding if the assessment is made after the effective date. If no assessment of such duty had been made before the effective date that could serve the party seeking review as the basis of a review of the underlying determination, made by the Secretary of the Treasury or the International Trade Commission before the effective date, on which such order, finding, or lack thereof is based, then the underlying determination shall be subject to review in accordance with the law in effect on the day before the effective date.

28 U.S.C. § 1541(a):

The Court of Customs and Patent Appeals shall have exclusive jurisdiction of appeals from all final decisions of the Court of International Trade.

28 U.S.C. § 1581:

Civil actions against the United States and agencies and officers thereof

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to con-

test the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any decision of the Secretary of the Treasury to deny or revoke a customhouse broker's license under section 641(a) of the Tariff Act of 1930; and

(2) any order of the Secretary of the Treasury to revoke or suspend a customhouse broker's license under section 641(b) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

28 U.S.C. § 2631:

Persons entitled to commence a civil action

(a) A civil action contesting the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930

may be commenced in the Court of International Trade by the person who filed the protest pursuant to section 514 of such Act, or by a surety on the transaction which is the subject of the protest.

(b) A civil action contesting the denial of a petition under section 516 of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person who filed such petition.

(c) A civil action contesting a determination listed in section 516A of the Tariff Act of 1930 may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose.

(d)(1) A civil action to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act may be commenced in the Court of International Trade by a worker, group of workers, certified or recognized union, or authorized representative of such worker or group that applies for assistance under such Act and is aggrieved by such final determination.

(2) A civil action to review any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act may be commenced in the Court of International Trade by a firm or its representative that applies for assistance under such Act and is aggrieved by such final determination, or by any other interested domestic party that is aggrieved by such final determination.

(3) A civil action to review any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act may be commenced in the Court of International Trade by a community that applies for assistance under such Act and is aggrieved by such final determination, or by any other interested domestic party that is aggrieved by such final determination.

(e) A civil action to review a final determination made under section 305(b)(1) of the Trade Agreements Act of

1979 may be commenced in the Court of International Trade by any person who was a party-at-interest with respect to such determination.

(f) A civil action involving an application for the issuance of an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930 may be commenced in the Court of International Trade by any interested party whose application for disclosure of such confidential information was denied under section 777(c)(1) of such Act.

(g)(1) A civil action to review any decision of the Secretary of the Treasury to deny or revoke a customhouse broker's license under section 641(a) of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person whose license was denied or revoked.

(2) A civil action to review any order of the Secretary of the Treasury to revoke or suspend a customhouse broker's license under section 641(b) of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person whose license was revoked or suspended.

(h) A civil action described in section 1581(h) of this title may be commenced in the Court of International Trade by the person who would have standing to bring a civil action under section 1581(a) of this title if he imported the goods involved and filed a protest which was denied, in whole or part, under section 515 of the Tariff Act of 1930.

(i) Any civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)-(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5.

(j)(1) Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that—

(A) no person may intervene in a civil action under section 515 or 516 of the Tariff Act of 1930;

(B) in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right; and

(C) in a civil action under section 777(c)(2) of the Tariff Act of 1930, only a person who was a party to the investigation may intervene, and such person may intervene as a matter of right.

(2) In those civil actions in which intervention is by leave of court, the Court of International Trade shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(k) In this section—

(1) "interested party" has the meaning given such term in section 771(9) of the Tariff Act of 1930; and

(2) "party-at-interest" means—

(A) a foreign manufacturer, producer, or exporter, or a United States importer, of merchandise which is the subject of a final determination under section 305(b)(1) of the Trade Agreements Act of 1979;

(B) a manufacturer, producer, or wholesaler in the United States of a like product;

(C) United States members of a labor organization or other association of workers whose members are employed in the manufacture, production, or wholesale in the United States of a like product; and

(D) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States.

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: HON. HERBERT N. MALETZ, JUDGE

Civil Action No. 80-5-00861
Complaint File

ZENITH RADIO CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

First Amended Complaint

Plaintiff, Zenith Radio Corporation, by and through its counsel, alleges herein as follows:

1. This action is brought pursuant to section 516A(a)(2) of the Tariff Act of 1930 (19 U.S.C. §1516a(a)(2)). This Court has jurisdiction by reason of 28 U.S.C. § 1581(c).

2. Alternatively, this action is brought pursuant to 5 U.S.C. § 772 [*sic*] *et seq.*, and is within this Court's subject matter jurisdiction by reason of 28 U.S.C. §1581(i).

3. Plaintiff is a manufacturer in the United States of television receivers.

4. On March 10, 1971, the Secretary of the Treasury caused to be published a finding of dumping with respect to television receivers from Japan (T.D. 71-76), which finding was issued and published pursuant to the Antidumping Act of 1921, as amended (19 U.S.C. § 160 *et seq.*).

5. Between the date of publication of T.D. 71-76 and March of 1972, the Bureau of Customs (now Customs Service) assessed, in the liquidation of entries of television receivers from Japan, approximately $1 million in antidumping duties.

6. No importation of television receivers from Japan entered subsequent to March 1972 was liquidated until March 31, 1978.

7. During the six year period between March 1972 and March 1978, the Customs Service had made repeated requests of manufacturers, exporters, and importers of television receivers from Japan for information which the Customs Service needed in order to ascertain the amounts of antidumping duties to be assessed on entries of television receivers from Japan. Specifically, the requested information was needed to enable the Customs Service to ascertain (a) the foreign market value (19 U.S.C. § 164) or constructed value (19 U.S.C. § 165) of television receivers from Japan covered by each entry, (b) the purchase price (19 U.S.C. § 162) or exporter's sales price (19 U.S.C. § 163) of said television receivers, and (c) the adjustments, if any, which would be made to the aforesaid foreign market value (19 U.S.C. § 161(b) and (c)). The Customs Service found that the manufacturers and exporters of television receivers from Japan either refused to submit, or to afford the Customs Service access to, requested information or were extremely tardy in submitting information, and, additionally, the information which was submitted was found to be inaccurate, incomplete, unreliable, and/or false.

8. Beginning in December 1976, the Customs Service learned that much information submitted to it by many of the importers of television receivers from Japan was false or fraudulent, designed to overstate the actual purchase price in order to reduce the antidumping duty liability. A massive investigation conducted by the Office of Investigations of the Customs Service revealed that importers, manufacturers, and exporters of television receivers from Japan engaged in rebate schemes as well as other practices directed to the masking of potential antidumping duties.

9. Under the Commodity Tax Law of Japan, a tax is levied on all television receivers produced for sale in Japan and is based on the freely offered selling price of the product for sales

to all purchasers in the ordinary wholesale quantities and in the ordinary course of wholesale trade. By late 1977, the Customs Service concluded that information submitted to the Customs Service by the manufacturers of television receivers from Japan could not be relied upon to establish foreign market value (19 U.S.C. § 164) or their claimed adjustments (19 U.S.C. § 161(b) and (c)). The Customs Service determined, with the approval of the Treasury Department, that the foreign market value could be accurately and properly ascertained by using information derived from Japanese Commodity Tax reports supplied by the Japanese manufacturers to the Japanese Government. This determination was based upon the following considerations: (a) by statute, Congress had instructed and authorized Customs Service officers to use all reasonable ways and means to ascertain, estimate and appraise the foreign market value, and any other fact deemed necessary for the purposes of the Antidumping Act; (b) the manufacturers of television receivers from Japan had consistently failed to furnish the Customs Service with requested information or else had provided the Customs Service with information that was incomplete, inaccurate, false, and/or unverifiable; (c) the long delay in the assessment of antidumping duties represented a perversion of the intent of the Antidumping Act and a negation of the remedial protection intended by Congress for the affected United States industry; (d) the statutory basis for the assessment of the Commodity Tax in Japan is virtually identical to the statutory definition of foreign market value in the Antidumping Act; and (e) the statements of the Japanese television receiver manufacturers submitted to the Japanese Government for the purpose of assessing the Commodity Tax constitute admissions of said manufacturers as to the foreign market value of the television receivers.

10. In late 1977 and early 1978, a special task force of customs officers proceeded to determine the amount of antidumping duties owing on unliquidated television receivers from Japan, entered, or withdrawn from warehouse, for consumption through March 1977. In making these calculations,

foreign market value was based on the Commodity Tax Law reports, hardly any adjustments were allowed, and purchase price was based on information contained in actual invoices, even though by that time the Customs Service had become aware that double invoicing and rebating were widespread and that the prices shown on the invoices were frequently overstated. It was determined that approximately $382 million in antidumping duties would be assessed in the liquidation of the aforesaid entries. Bulletin notices of liquidation for these entries were prepared, were dated March 31, 1978, and were to be posted on March 31, 1978, at customhouses throughout the United States.

11. On March 28, 1978, the General Counsel of the Treasury Department met with the First Secretary of the Embassy of Japan and numerous attorneys for Japanese television manufacturers. On March 30, 1978, Customs Headquarters issued telex instructions to all regional commissioners, all district directors, and all area directors, instructing that all entries of television receivers from Japan entered subsequent to June of 1973 be deleted from the bulletin notices of liquidation that were to be posted on March 31, 1978. The deletions were made by hand by Customs Service field personnel before the bulletin notices were posted. On March 31, 1978, the amended bulletin notices of liquidation were posted, entries of television receivers from Japan entered on or before June 30, 1973 were liquidated, and approximately $46 million in antidumping duties were assessed thereon. With respect to these liquidated duties, normal collection efforts were not pursued by the Customs Service.

12. With respect to false statements appearing on invoices, designed to overstate the purchase price of television receivers from Japan, the Customs Service determined that the matter could be satisfactorily addressed under section 592 of the Tariff Act of 1930 (19 U.S.C. § 1592) and under various criminal statutes. Thus, the Customs Service continued to conduct section 592 investigations and, also, in March 1978, turned over to the Criminal Division of the Department of Justice

evidence with respect to undisclosed kickbacks and rebates, that it had accumulated, to support possible prosecutions of fraud. Subsequently, several grand juries conducted investigations into these matters. Thus far, one multicount indictment has been returned against a major importer of television receivers from Japan and, further, another importer of television receivers from Japan has pleaded guilty to a Customs fraud charge.

13. In December 1978, television receivers of three Japanese manufacturers which were entered between July 1, 1973 and December 31, 1974 were liquidated. In June 1979, a relatively small number of entries of television receivers from Japan was also liquidated. The total antidumping duties assessed in the liquidations of December 1978 and June 1979 was approximately $32 million. Upon information and belief, certain entries of television receivers from Japan manufactured by Sony Corporation of Japan were liquidated in December 1979 resulting in the assessment of less than $500,000 in antidumping duties. Other than those entries liquidated in December 1978, June 1979, and in December 1979, no entries of television receivers from Japan entered subsequent to June 30, 1973 have been liquidated. Most all of the liquidations of March 1978, December 1978, and June 1979 were protested by the importers. Protest decisions were issued by the Customs Service in late 1979 and early 1980, denying in part and allowing in part the protest claims against the liquidations of March 1978. In the protest decisions, the Customs Service upheld the use of the Commodity Tax approach in ascertaining foreign market value but it allowed many of the Japanese manufacturers' claimed adjustments, thereby reducing the amounts of antidumping duties owed.

14. Effective January 1, 1980, the determination of antidumping duties on entries of merchandise subject to a finding of dumping and not assessed with antidumping duties as of that date became governed by the procedure specified in section 751 of the Tariff Act of 1930 (19 U.S.C. § 1675), which was added by the Trade Agreements Act of 1979. Among other

things, section 751 provides interested parties with the opportunity and the right to participate in the proceeding for determining the amount of antidumping duties to be assessed. Further, section 516A(a)(2)(B)(iii) of the Tariff Act of 1930 (19 U.S.C. § 1516a(a)(2)(B)(iii)), added by the Trade Agreements Act of 1979 and also effective on January 1, 1980, provides interested parties with the opportunity and the right to obtain judicial review of administrative determinations reached under section 751.

15. Effective January 2, 1980, the responsibility for administering the antidumping law and for acting as the "administrative authority" under section 751 and other sections of the Tariff Act of 1930 was transferred to the Secretary of Commerce (Exec. Order 12188).

16. On March 28, 1980, the Department of Commerce caused to be published a notice in the Federal Register (45 Fed. Reg. 20511), pursuant to section 751(a)(1) of the Tariff Act of 1930, in which it stated that it was "conducting an administrative review of findings of dumping under the Antidumping Act, 1921, to determine the foreign market value and United States price of each entry of merchandise subject to the finding . . . and to determine the amount, if any, by which the foreign market value exceeds the United States price." The dumping finding of television receivers from Japan was listed specifically among those findings for which the administrative review would be conducted. The notice also stated: "After providing an opportunity for comment by interested parties, the Department of Commerce will publish in the Federal Register the results of such review, together with notice of any antidumping duties to be assessed and estimated antidumping duties to be deposited."

17. On April 28, 1980, Homer E. Moyer, Jr., General Counsel of the Commerce Department, conducted a press conference at the Commerce Department. That conference was attended by plaintiff's counsel, among other persons. At the conference, Mr. Moyer advised that the Commerce and

Treasury Departments had on that date concluded agreements to settle claims for antidumping duties and penalties related to the importation of television receivers from Japan during the period 1971 to 1979. Mr. Moyer cited 19 U.S.C. § 1617 as the legal authority for the settlement. He indicated that agreements had been reached with 22 importers and that these importers accounted for the great bulk of imported television receivers subject to the finding, T.D. 71-76. Distributed at the conference were (a) a press release dated April 28, 1980, (b) a prototype settlement agreement, and (c) a list of the informal names of companies with whom agreements had been reached. Copies of these documents as well as a copy of the transcript of the press conference are annexed hereto as Collective Exhibit 1 and made a part hereof. Included in the settlement were (a) claims by the United States arising out of liquidations—some of which claims were asserted in several collection suits in United States District Courts, (b) claims by an importer of television receivers from Japan in an action in this Court challenging the assessment of antidumping duties on two entries, (c) alleged claims by the United States for penalties arising out of an investigation relating to section 592 of the Tariff Act of 1930, and (d) alleged claims by the United States arising out of unliquidated entries of television receivers from Japan, entered between July 1, 1973 and March 31, 1979.

18. At the press conference of April 28, 1980, Mr. Moyer indicated that the Commerce Department had determined that the total amount of antidumping duties on the subject entries of television receivers from Japan was approximately $138.7 million. Included in this amount was an amount found to be due on the previously liquidated and protested entries, which amount, upon information and belief, was approximately $13 million.

19. Under the terms of the settlement, a total of between $75 and $77 million would be paid by the importers. Approximately $66 million represented antidumping duties and approximately $9 to $11 million represented penalties under 19 U.S.C. § 1592. In return for these payments (or agreements to

make these payments) the responsible agencies of the United States would: (a) dismiss with prejudice the suits for the collection of duties; (b) abandon certain further administrative investigations concerning the possible imposition of civil penalties pursuant to 19 U.S.C. § 1592; and (c) within ten days, issue instructions to Customs officers to liquidate entries made prior to March 31, 1979 without assessing any antidumping duties. The settlement agreements also contained false statements, including the following: "The United States knows of no violation or potential violation of law relating to or arising from the importation, sale or exportation of television receivers by the . . . [importer] or the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase . . . ."

20. Neither plaintiff nor any of its representatives was aware of the settlement or settlement agreements, or of any of the substantive determinations reflected therein, until the announcement was made thereof at the aforedescribed press conference.

21. On May 9, 1980, the United States Court of Appeals for the District of Columbia Circuit, in the case of *The Committee to Preserve American Color Television (a.k.a. COMPACT) et ano* v. *Miller, et al.*, Appeal No. 79-1948, issued, *per curiam*, an injunction pending appeal, pursuant to the appellants' motion, thereby enjoining the Customs Service from liquidating entries of television receivers subject to T.D. 71-76 or from implementing the terms of any of the settlement agreements pending the subject appeal. That appeal arose out of an action brought in the United States District Court for the District of Columbia to challenge the protracted refusal of officials of the Treasury Department and Customs Service to enforce T.D. 71-76 as required by law through the assessment and collection of antidumping duties. The District Court dismissed the action for lack of subject matter jurisdiction and the plaintiffs therein filed an appeal to challenge that jurisdictional ruling. After the Court of Appeals issued the injunction pending appeal, the appellees filed a motion to dissolve the injunction, which motion was denied *per curiam*, in an order entered on May 27,

1980. Thereafter, the appellees filed a motion to expedite the appeal, and the appellants filed a motion for leave to file a supplemental brief. On June 17, 1980, the Court of Appeals, *per curiam*, denied the motion to expedite and ordered the parties to file supplemental briefs.

22. In reaching or prior to reaching the settlement agreements, discussed above, the Commerce Department did the following: (a) it determined the foreign market value, including adjustments to foreign market value, and the United States price (*i.e.*, purchase price or exporter's sales price) for all unliquidated entries of television receivers from Japan, entered prior to April 1, 1979; (b) it determined that the amount of antidumping duties due on said unliquidated entries was approximately $138.7 million (less the relatively small amount found due on previously liquidated and protested entries); (c) it determined that it would demand, as antidumping duties for the said unliquidated entries, approximately $66 million (less the relatively small amount found due on previously liquidated and protested entries); and (d) it determined that no antidumping duties would be assessed in the individual liquidations of the aforesaid unliquidated entries. Thus, the Commerce Department has made determinations described in section 751 of the Tariff Act of 1930, although, in failing to give plaintiff or other interested parties representing the domestic television industry an opportunity to be heard prior to making such determinations, it has not followed the procedures mandated by that section or other provisions of law and it has not followed the procedures which it appeared to indicate it would follow in the Federal Register notice of March 28, 1980 (*see* ¶ 16, *supra*). Moreover, the Commerce Department had made its determination as to the amount of antidumping duties due (*see* (b) above) well in advance of the settlement of April 28, 1980. Instead of publishing that determination in accordance with section 751, which would have enabled the plaintiff to contest the determination promptly in this Court, the Commerce Department engaged in secret negotiations with representatives of manufacturers, exporters, and importers of television re-

ceivers from Japan, which negotiations culminated in the aforedescribed settlement.

23. Plaintiff contests the aforedescribed settlement and further contests the following: (a) the Commerce Department's determination that the amount of antidumping duties due on unliquidated entries of television receivers from Japan, entered prior to April 1, 1979, was only approximately $138.7 million (less the relatively small amount found due on previously liquidated and protested entries); (b) the Commerce Department's determination to demand only approximately $66 million (less the relatively small amount found due on previously liquidated and protested entries) as antidumping duties for the aforedescribed unliquidated entries, (c) the Commerce Department's determination not to assess any antidumping duties in the individual liquidations of the aforedescribed entries, and (d) the Commerce Department's failure to follow the mandatory procedures set forth in section 751 of the Tariff Act of 1930. Plaintiff believes that the total amount of antidumping duties which should be assessed on the aforesaid unliquidated entries is in the vicinity of $600 million and that the Commerce Department's determination to reduce the amount of antidumping duties to $138.7 million, as described in (a) above, is without any substantial evidence to support it, is arbitrary, is without any rational basis in fact, and is unlawful.

24. Plaintiff has participated in the antidumping proceeding involving television receivers from Japan, by having submitted relevant and substantial information to the Treasury Department (including Customs Service) and Tariff Commission (now International Trade Commission) before the issuance of the finding (T.D. 71-76) as well as having submitted relevant and substantial information to the Treasury Department (including Customs Service) subsequent thereto.

25. On May 27, 1980, within 30 days after having received actual notice of the settlement agreements, plaintiff initiated this action under and in accordance with § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, by the filing of a summons. The original

complaint was also filed under and in accordance with § 516A(a)(2)(B)(iii), within 30 days after the filing of the aforesaid summons.

26. Plaintiff stands to be adversely affected or aggrieved by the subject settlement agreements. These agreements have resulted in the denial to plaintiff of procedural and substantive rights which Congress intended for it to have under section 751 of the Tariff Act of 1930. If it is concluded that the settlement agreements do not contain determinations described by section 751, *supra*, then the agreements will have deprived plaintiff of yet an additional congressionally-bestowed right, namely, the right to judicial review pursuant to section 516A of the Tariff Act of 1930. Further, if the settlement agreements are implemented they will result in the unlawful release from antidumping duty liability to plaintiff's competitors of hundreds of millions of dollars.

FIRST CAUSE OF ACTION

27. The allegations of ¶¶ 1 through 26 are hereby incorporated by reference as though set forth at length.

28. The settlement of alleged claims related to the importation of television receivers from Japan is *ultra vires*, illegal, and void.

29. Section 617 of the Tariff Act of 1930, as amended (19 U.S.C. § 1617) does not provide any authority for the settlement of the alleged claims related to the importation of television receivers from Japan, for the avoidance of the procedures specified by Congress in section 751 of the Tariff Act of 1930, relating to the determination and assessment of antidumping duties on entries subject to findings of dumping, and for the avoidance of the assessment of antidumping duties in accordance with the statutory command of the antidumping provisions of the law.

30. The subject settlement constitutes an unlawful attempt by officials of the United States Government (a) to deprive the plaintiff of the opportunity to be heard before

substantive determinations involving the amounts of antidumping duties to be assessed on merchandise subject to an existent dumping finding were made, (b) to deprive the plaintiff of the right of judicial review over such determinations, and (c) to oust this Court of jurisdiction to review such determinations, which opportunity to be heard, which right to judicial review, and which jurisdiction were clearly conferred by Congress in the Trade Agreements Act of 1979.

SECOND AND ALTERNATIVE CAUSE OF ACTION

31. The allegations of ¶¶ 1 through 26 are hereby incorporated by reference as though set forth at length.

32. Assuming that section 617 of the Tariff Act of 1930 provided the authority to settle the alleged claims related to the importation of television receivers from Japan (which authority plaintiff denies), the United States Government officials who recommended and who determined that the alleged claims should be settled acted arbitrarily, capriciously, in bad faith, and unlawfully. Accordingly, the settlement is illegal and void and the failure of the Commerce Department to follow the procedures specified in section 751 of the Tariff Act of 1930 and to make proper determinations and assessments of antidumping duties on entries of television receivers from Japan is likewise illegal.

33. The Secretary of Commerce, in approving the recommendation for settlement, and the United States Government officials who recommended settlement, did not take into account those factors which Congress deemed relevant to any settlement of claims authorized by section 617 of the Tariff Act of 1930. Moreover, neither the Secretary of Commerce in deciding to settle the alleged claims nor those Government officials who had the statutory responsibility to recommend settlement exercised the independent judgment contemplated by Congress, in enacting section 617.

34. The recommendations and the decision to settle the alleged claims as well as the terms of the settlement were based on the bad faith and improper motivations of persons in

the Executive Branch, including the Executive Office of the President, the Commerce Department, the Treasury Department, and other agencies. The recommendations and decision to settle, and terms of the settlement, were based primarily on political and other irrelevant considerations in defiance of the mandatory provisions of the governing statutory law.

35. The Commerce Department's representation that the maximum antidumping duty liability for television receivers from Japan was only approximately $138.7 million was arbitrary and made in bad faith. First, that determination was known by the Commerce Department and officials in other Government agencies to have been based upon falsely inflated purchase price information, concealing true margins of dumping. Second, the $138.7 million amount reflects arbitrary allowances based upon Japanese manufacturers' unjustified claims for adjustments to foreign market value. The granting of these claims for adjustments resulted in the reduction of antidumping duties by hundreds of millions of dollars. The granting of these claims was made notwithstanding the following: (a) the Customs Service had made numerous efforts to verify said claims (including numerous visits by Customs Service attorneys and auditors to the facilities of the television receiver manufacturers in Japan) and had repeatedly rejected the claims as being unreliable and unsubstantiated; (b) numerous Customs Service attorneys and auditors had recommended against the allowance of said claims; (c) private auditors retained by the Government for the purpose of giving advice with respect to the adjustment claims of a leading Japanese television manufacturer had recommended to the Customs Service that the claims were not supported by the available data; and (d) numerous Customs Service attorneys had correctly recommended against the allowance of some of the claims as a matter of law.

36. The suggestion made by officials in the Commerce Department that the Commodity Tax approach to determining foreign market value is somehow unsound or vulnerable is false and was made in bad faith. The Commodity Tax approach to

determining foreign market value of television receivers from Japan is sound and lawful and had been, over an extended period of time, carefully studied, analyzed, and approved by numerous attorneys and responsible officials in the Customs Service and Treasury Department.

37. The subject settlement represents the culmination of many years of utter disregard for the law by officials of the Executive Branch. The administration and enforcement of the Antidumping Act with respect to television receivers from Japan has consistently been frustrated and subject to extreme political pressures. In May 1977 when the United States entered into a publicized agreement with Japan (Orderly Marketing Agreement) to limit the number of color television receivers exported from Japan to the United States, the two governments also entered into a secret side agreement in which the President's Special Representative for Trade Negotiations agreed on behalf of the United States that the Treasury Department would assess antidumping duties "in strict conformity with the international Antidumping Code," notwithstanding that the Code differed from the Antidumping Act in several respects, including, but not limited to, the authorization in the Code to calculate antidumping duties in an amount less than the actual dumping margin. Subsequently, in carrying out their responsibilities in connection with the administration of the Antidumping Act with respect to television receivers from Japan, Customs Service attorneys and other personnel have been interfered with and pressured by United States Government officials to reach decisions contrary to law and fact and hospitable to the interests of the manufacturers, exporters, and importers of television receivers from Japan, and to the Government of Japan. Assignments and reassignments of Customs Service attorneys and other personnel have been made in order to accommodate the interests of the manufacturers, exporters, and importers of television receivers from Japan and the Government of Japan. United States Government officials, for over at least a year and a half, have been negotiating with officials of the Government of Japan and

with representatives of manufacturers, exporters, and importers of television receivers from Japan with the objective of reaching a settlement of alleged claims arising in connection with the importation of television receivers from Japan. Finally, United States Government officials included, in the settlement agreements signed on April 28, 1980, language known by them to be false (*see, e.g.*, ¶ 19, *supra*), which language was designed to give aid and comfort to those manufacturers and importers of television receivers from Japan who are defendants in a major civil antitrust suit, and which language has in fact been relied upon by the attorneys for said manufacturers and importers in a recent court proceeding in that suit. In sum, the subject settlement has been incurably tainted by an alarming history of political interference, bad faith, and lawlessness on the part of those United States Government officials entrusted with the administration and enforcement of the applicable law.

PRAYER FOR RELIEF

WHEREFORE, it is respectfully prayed that this Honorable Court (1) determine that the settlement of alleged claims for antidumping duties related to the importation of television receivers from Japan is illegal and void; (2) direct that the settlement be set aside and that the liquidation of entries pursuant to the settlement be permanently enjoined; and (3)

provide any other relief which this Honorable Court deems just and proper.

Respectfully submitted,

/s/ Frederick L. Ikenson
FREDERICK L. IKENSON
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
Telephone: (202) 483-8900

/s/ Philip J. Curtis
PHILIP J. CURTIS
1000 Milwaukee Avenue
Glenview, Illinois 60025
Telephone: (312) 391-8110
Attorneys for Plaintiff

Dated: November 3, 1980

VERIFICATION

I declare under penalty of perjury that the allegations in the foregoing First Amended Complaint are true and correct according to the best of my knowledge, information, and belief.

/s/ Frederick L. Ikenson
FREDERICK L. IKENSON

I declare under penalty of perjury that the allegations in the foregoing First Amended Complaint are true and correct according to the best of my knowledge, information, and belief.

/s/ Philip J. Curtis
PHILIP J. CURTIS

Collective Exhibit 1

UNITED STATES DEPARTMENT OF
COMMERCE NEWS
WASHINGTON, D.C. 20230

Office of the Secretary

CONTACT: Dan Landa (202) 377-2253 G 80-79

For Release Monday, April 28, 1980

Commerce Department Reaches Agreement On TV Import Cases

The Secretary of Commerce today announced that the Commerce Department and Treasury Department have reached agreement with all the major importers covering outstanding claims on television receivers imported from Japan prior to April 1, 1979. Under the terms of the agreements, the Commerce Department has agreed to drop claims for dumping duties. The Treasury Department has agreed that it will cease penalty investigations in preparation and not bring any formal charges.

If all importers agree to settlement, the Commerce and Treasury Departments will receive in excess of $75 million. Agreements already executed include settlement amounts in excess of $70 million. The Commerce and Treasury Departments accept these payments as settlement of Government claims; the companies pay the amounts in settlement but do not admit that dumping duties or penalties are owed.

As a part of these settlements, the Justice Department has agreed to terminate actions for collection of unpaid duty assessments, which were filed last year.

The agreements provide that the Commerce Department will insure that all future assessments of antidumping duties on television receivers are conducted on a timely basis, and that the importers will cooperate with the Commerce Department in submitting data and making information available for verification. With this cooperation, future reviews will be based upon the traditional procedures prescribed in the Trade Agreements Act, and not the Commodity Tax approach that was adopted by the Treasury Department in 1978 and 1979.

The Commerce Department will now transfer resources committed to the assessment backlog in the television dumping proceeding to the preparation of prompt future liquidations within the terms of the 1979 Trade Agreements Act.

AGREEMENT

THIS AGREEMENT is made this ____ day of April, 1980, by and between _____, a corporation organized under the laws of the State of _____ (hereinafter referred to as the "Company"), and the United States Department of Commerce, the United States Treasury Department, the United States Customs Service, and the United States Department of Justice (the aforesaid hereinafter referred to individually and collectively as the "United States").

WITNESSETH

WHEREAS, the United States has assessed certain duties pursuant to T.D. 71-76 for the importation of television receivers from Japan and has claims for additional duties under T.D. 71-76 for the period through March 31, 1979;

WHEREAS, the United States has reviewed such assessments and claims, the facts upon which they are based, and the probabilities of collection or recovery;

WHEREAS, the Company disputes the validity of such assessed duties and other claims;

NOW, THEREFORE, in consideration of the premises and the mutual covenants and promises contained herein and other good and sufficient consideration, the receipt and adequacy of which being hereby acknowledged, the parties hereto, intending to be legally bound hereby, agree as follows:

1. This Agreement is for settlement purposes only, and is not intended to constitute and shall not be construed as an admission that the Company is to any extent liable for antidumping duties on its importations of television receivers subject to T.D. 71-76. Payments hereunder do not constitute, nor shall they be construed as, forfeitures, fines or penalties (or payments in lieu thereof), and nothing herein is intended as or shall be construed as an admission by the Company, its subsidiaries, affiliates, parents, officers, directors, employees, representatives, agents, successors and assigns, or any of them, of any violation of law. The subject matter of this agree-

ment, insofar as it pertains to any matter within the jurisdiction of the United States Treasury Department, relates solely to matters arising under the Customs laws of the United States and is not meant to be reflective of the Department's views or bind the Department with respect to any other law.

2. The Company will pay to the United States the sum of $____, which shall be paid as follows:

A. $25%, by check payable to the United States within thirty (30) days after the United States District Court(s) has (have) entered order(s) dismissing, with prejudice, the complaint(s) referred to in paragraph 3 below;

B. $75%, by check payable to the United States within one hundred and eighty days (180) after the United States District Court(s) has (have) entered order(s) dismissing, with prejudice, the complaint(s) referred to in paragraph 3 below;

Beginning on the sixteenth (16th) day after the date the agreement is signed, interest shall be payable on any unpaid amounts at the rate in effect under section 6621 of the Internal Revenue Code of 1954.

The Company shall have the right to prepay, in whole or in part, any amount due hereunder, without any penalty, charge or assessment.

3. Promptly upon the execution of this Agreement, the United States shall cause to be dismissed, with prejudice, its complaint(s) or amended complaint(s) in civil actions pending in the United States District Court(s) against the Company, its sureties and brokers with respect to entries of television receivers prior to April 1, 1979, and, to this end, shall execute and deliver to the Company the stipulation(s) in the form annexed hereto.

4. With respect to entries of television receivers by the Company prior to April 1, 1979:

(a) The United States shall liquidate promptly at invoice unit values entries of said television receivers which have not yet been liquidated;

(b) The United States shall reliquidate promptly at invoice unit values liquidations of entries of said television receivers which are not final and conclusive due to the timely filing of protests with respect to such liquidations;

(c) The United States shall re-reliquidate promptly at invoice unit values reliquidations of entries of said television receivers to the extent such reliquidations have not become final and conclusive;

(d) Within 10 days of the date of this Agreement, the United States Customs Service shall issue instructions to begin prompt liquidation of all entries of television receivers subject to this Agreement in accordance with subparagraphs (a), (b), and (c) of this paragraph;

(e) The Company waives any further procedural or administrative steps, except those specified herein;

(f) The Company waives any requirement that any decision of the United States contain a statement of findings of fact and conclusions of law;

(g) The Company waives all rights to seek administrative or judicial review or otherwise challenge or contest the validity of this Agreement or the liquidations, reliquidations, or re-reliquidations, except for clerical error or mistake of fact pursuant to section 520(c) of the Tariff Act of 1930 (19 U.S.C. 1520(c));

(h) The Company shall cooperate in supplying any documents or information necessary to the completion of liquidations under this paragraph; and

(i) The United States knows of no violation or potential violation of law relating to or arising from the importation, sale or exportation of television receivers by the Company or the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase; and the United States shall cease any pending investigation relating to television receivers manufactured in Japan and which the Company entered prior to April 1, 1979.

5. The United States hereby releases, waives, remises and discharges in full (a) all claims for antidumping duties on all

entries of television receivers liquidated or to be liquidated subsequent to March 30, 1978, which are subject to T.D. 71-76 on which the Company made entry prior to April 1, 1979, and (b) all claims, if any, arising under section 592 of the Tariff Act of 1930 (19 U.S.C. 1592), of which it presently knows or, under existing procedures for examining documents or analyzing information, should have known, with respect to entries of television receivers made prior to April 1, 1979.

6. With respect to the appraisement and liquidation of entries of television receivers from Japan subsequent to March 31, 1979 under T.D. 71-76, the parties agree:

(a) That the payment by the Company pursuant to this Agreement shall not be deemed an expense required to be included in any calculation of expenses for such appraisement and liquidation, and such payment shall otherwise be disregarded in making the calculations and assessments of duties, charges or other exactions imposed upon such imports;

(b) That the United States shall provide the Company and the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase a reasonable opportunity to submit transactional information and data relevant to such appraisements and liquidations;

(c) That the Company shall use its best efforts to supply, on a timely basis, complete and accurate information and data where and as required by the laws of the United States of America and applicable regulations under such laws;

(d) That the Company shall permit representatives of the United States to visit its facilities, and to have reasonable access, at mutually convenient dates during regular business hours, to all relevant records and personnel of the Company relating to the importation and sale of television receivers from Japan;

(e) That the Company shall use its best efforts to cause the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase to supply, on

a timely basis, complete and accurate information and data where and as required by the laws of the United States of America and applicable regulations under such laws;

(f) That the Company shall use its best efforts to cause the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase to permit representatives of the United States to visit its facilities and to have reasonable access, at mutually convenient dates during regular business hours, to all relevant records and personnel of the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase relating to television receivers manufactured in Japan;

(g) That the Company shall use its best efforts to aid the United States, whenever the United States deems such actions necessary, in locating and obtaining information from persons and organizations that do business with the Company's Japanese manufacturer/exporter;

(h) That the United States shall utilize the traditional methodology in calculating foreign market values, purchase prices and exporter's sales prices based upon information and data supplied by the Company and the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase unless the United States justifiably concludes that the data submitted by the Company and the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase is untimely, materially inaccurate or incomplete. For the purposes of this subparagraph, "traditional methodology" includes the method under which entries under T.D. 71-76 were assessed and liquidated prior to March 31, 1978, as altered by any changes in that method reflective of applicable amendments to the Antidumping Act, or the regulations and practices thereunder;

(i) That the United States shall use its best efforts to ensure that the appraisement and liquidation of entries shall be made on a timely basis, using complete and reliable information;

(j) That the United States shall promptly revoke or modify T.D. 71-76 as soon as circumstances warrant such revocation or modification in accordance with procedures set forth in the applicable regulations of the Commerce Department;

(k) That the United States acknowledges and agrees that neither the Company nor the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase has, as of the date of the execution of this Agreement, failed to comply with any requests for information or data under T.D. 71-76 by the United States;

(l) That the United States, in administering T.D. 71-76, shall not use any sanction, regulation, ruling, procedure or practice which discriminates against the Company or the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase or against importations of merchandise by the Company into the United States of America; and

(m) That the United States shall make an equitable adjustment in the amount payable by the Company hereunder and, if necessary, refund the amount of such adjustment to the Company, in the event that the United States compromises the amount originally specified of any settlement for claims for duties arising under T.D. 71-76 with any other importer of television receivers from Japan relating to entries prior to April 1, 1979.

7. Representations and Warranties:

(a) The United States represents and warrants that it, its agents and employees, in order to determine whether or not to enter into this Agreement, (i) have had access to, and full opportunity to obtain, review and confirm, any and all information about the Company, its parent or affiliates, and (ii) have conducted a full and complete investigation into all circumstances surrounding importations of television receivers produced in Japan.

(b) Each party to this Agreement represents and warrants that it has the full right, power and authority to execute and deliver this Agreement, and that no approval or authorization by any other person is required for this Agreement to be binding on such party.

8. This Agreement shall be null and void in the event that there be, and upon, a judicial decision final by appeal or, if the time to appeal shall have expired without an appeal having been taken, that the United States did not have the right, power or authority to enter into this Agreement. Within ten (10) calendar days after such decision, the United States shall refund the consideration paid by the Company, pursuant to paragraph 2 above. Nevertheless, if, at the time the agreement be finally declared null and void, the entries of television receivers subject to T.D. 71-76 made prior to April 1, 1979, have been liquidated or reliquidated with no assessment of antidumping duties, and such liquidations or reliquidations have become final or conclusive upon all persons, the applicable consideration paid by the Company shall not be refunded.

9. This Agreement shall be binding upon the Company and shall inure to the benefit of the Company, its respective subsidiaries, affiliates, parents, officers, directors, employees, representatives, agents, successors and assigns, and shall be binding upon, and shall inure to the benefit of the United States.

10. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which, together, shall constitute one and the same instrument.

11. This Agreement represents the entire understanding and agreement between the Company, its subsidiaries, affiliates, parents, officers, directors, employees, representatives, agents and assigns, on the one hand, and the United States, on the other hand, in respect to the subject matter hereof, and supersedes any prior negotiation, letter or understanding relating to the subject matter hereof.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have executed this Agreement on the date first above written.

UNITED STATES DEPARTMENT OF COMMERCE

By: _____

UNITED STATES DEPARTMENT OF TREASURY

By: _____

UNITED STATES CUSTOMS SERVICE

By: _____

UNITED STATES DEPARTMENT OF JUSTICE

By: _____

THE COMPANY

By: _____

Companies With Whom Agreements Have Been Signed

General (Technika)
Hitachi
J.C. Penney
U.S. JVC Corp.
Matsushita
Midlands
Mitsubishi (MELCO)
Mitsubishi International
Montgomery Wards
Nippon Electric
Sears Roebuck & Co.
Sanyo
Sharp
T.G. & Y. Stores, Inc.
Toshiba
Western Auto
White Stores, Inc.

April 28, 1980

THE DEPARTMENT OF COMMERCE

Briefing By

HOMER MOYER, GENERAL COUNSEL,
U.S. DEPARTMENT OF COMMERCE
and
SAL CARAMAGNO, DIRECTOR OF CLASSIFICATION AND VALUE,
U.S. CUSTOMS SERVICE

April 28, 1980

MR. HARTWIG: Good afternoon, ladies and gentlemen. I'm Ron Hartwig, Director of Public Affairs. I'm glad you could all come out to this early morning press conference. We're very sorry about the hour. It was chosen because of the number of people involved.

We have a major announcement to make on a development in the area of the importation of Japanese television receivers. Homer Moyer, who is General Counsel, will give some background and questions can then be addressed to him and Sal Caramagno of the U.S. Customs Service. Homer?

MR. MOYER: The Commerce Department and Treasury Department have today concluded settlements of claims for dumping duties and penalties related to the importation of television receivers from Japan during the period 1971 to 1979.

Settlement amounts will total between $75 and $77 million. Of this amount, $66 million is for dumping duties; that is, against possible dumping duty claims of $138.7 million.

While the dumping finding will remain in effect, the settlement will allow the current system to proceed on a current basis, beginning from April 1, 1979.

What I would like to do—take a few minutes to do is simply walk through with you some of the details of this particular settlement.

This is a long-standing and complex matter and I would like to touch on several different aspects of it, give you a little bit of

the background and then I and Mr. Caramagno from the Customs Service will attempt to answer your questions. There are other representatives here in the audience from the Commerce Department and Customs, the Treasury Department and the Justice Department, all of whom, as you will see, are involved in one respect or another.

First, let me recite for you precisely what is covered by the settlement agreement. First, as I mentioned, settlement of dumping duty claims for the importation of Japanese televisions from 1971 through March 1979. Second, settlement of so-called Section 592 cases—civil cases under the jurisdiction of Customs. Those cases relate to invoicing of [*sic*] practices associated with imports.

Third, the collection suits now being prosecuted by the Justice Department and [*sic*] a number of courts around the country. These collection suits relate to amounts of dumping duties for the early period—the 1971 to 1973 segment of this period—earlier assessed and not yet collected. Those suits will be settled as a result of these agreements.

And fourth, the so-called white stores [*sic*] litigation and lawsuit by an importer challenging the assessment and collection procedures relating to the original dumping duties.

Involved in the settlements potentially, are 110 importing companies. As of this moment, 22 of those companies have executed settlement agreements. These 22 companies account for approximately $70 million of the $75 to $77 million in total settlement amounts.

The 110 companies are all importers. They are both so-called related and unrelated importers. By that I mean related importers are appropriate affiliates of Japanese manufacturers; unrelated companies are U.S. corporations that have no corporate affiliation with Japanese manufacturers.

The settlement of these cases is under the authority of the Secretary of Commerce under Section 1617 of Title IX [*sic*]. That is a provision that confers respectively on the Secretary

of the Treasury and Commerce broad authority to settle and compromise claims arising under the customs law.

The authority of the Secretary of Commerce under this section relates to claims arising under the anti-dumping and counter-billing [*sic*] duty laws.

Let me turn first to the dumping duty settlement. These settlements are result [*sic*] in a large portion of a dispute that dates back some 12 years. Petitions precipitating this inquiry were originally filed in 1968.

This settlement covers claims up through March of 1979. For claims subsequent to March 1979, they will be processed on a current basis under the current law in the manner and employing the methodology traditionally used in any dumping cases.

As many of you know, the responsibility for the anti-dumping program was transferred to Commerce Department from the Treasury Department the 1st of this year.

Since the first of the year, Commerce Department has analyzed the facts of the claims in these cases, the legal theories on which they have been based, and we have produced our own assessment of what the maximum defensable [*sic*]—legally defensable [*sic*] dumping duty claims might be. That figure has been produced in final form within the last several weeks.

That indicates that that figure is $138.7 million—the figure I mentioned at the outset. That is, using our own figures, our best estimate of the maximum claims for dumping duties that this department could make for this time period. That assessment takes into account adjustments that have been made to earlier claims for dumping duties as a result of the so-called protest decision by which initial assessments are issued and made public.

Individual companies file protests, and the government responds to those protests allowing or disallowing individual claims for adjustments.

That assessment also takes into account the so-called high yen period—the period 1977, '78 when the yen was rapidly appreciating—the phenomenon that gave rise to price disparities that may be reflected in dumping.

With respect to the Section 592 cases, Mr. Caramagno will be happy to answer any specific questions you have. These cases involve 10 companies. The settlement agreements already executed involved 4 of those 10 companies. The settlement amount that will be involved for the 592 cases is between $9 and $11 million.

The importance of this settlement and these settlement agreements is several. First, these agreements effectively eliminate a very substantial backlog of unliquidated entries dating back several years which, if left unresolved, would represent and have represented a very substantial burden on the system of import administration—on the administration of the antidumping and counter-bailing [*sic*] duty laws.

Secondly, these agreements resolve this longstanding dispute. They resolve it fairly and on terms that are very fair to the United States.

Third and prospectively, these settlements will allow this department to allocate the resources within the Office of Import Administration to operating that system on a current basis, avoiding problems associated with back claims, assuring that any findings of dumping and duties associated with that would be imposed on a timely and current basis, which will allow timely price adjustments and minimize the kinds of cumulative problems that are represented by these types of cases and the figures that have been associated with it.

With that, I think we should open the floor to questions and Mr. Caramagno and I will be happy to take them.

MR. HARTWIG: Thank you, Homer. We would like to limit questioning please to those of you who are in the media. There will be an opportunity for the others who are in attendance to ask your questions later. First question.

Q. Yes, Compact, you know, put out a statement a week or two ago saying that in fact $700 million of dumping duties were owed. I'd like your comment on that, please.

MR. MOYER: The figures in that range—and the $400 to $700 million range were bandied about a bit beginning a couple of years ago. Those figures were, as I understand it, projections based on the original unadjusted duty assessment, based on the so-called commodity tax approach.

Those assessments and the basis for those projections was a very limited early period of time were [*sic*] subject to the protest decision process which I alluded to. As a result of that process, individual companies came forward and claimed adjustments to which they felt they were entitled under the law. Those claims, 699 in number, were reviewed by the Department and as a result of those, adjustments were allowed or disallowed in individual cases.

As a result of that process was a series of numbers much more realistic in terms of what possible dumping duty claims might be, and much closer to what might be legally sensible. Those figures, as a result of the protest decisions were reduced, I think, in the range of 60 to 90 percent—and original figure of $46 million was, as I recall, reduced to something under $8 million. In a word, the figure you referred to is very much out of date. It is, in my judgment and I think the judgment of most people who have been involved in this case, not remotely legally sensible. And, as I mentioned in my statement, the best figure—the best maximum figure that we have at this time, taking into account all of the information we have, is $138.7 million.

Q. I'm a little confused about that $138.7 million. Is that the figure that you have reached in the settlement or is that what you're saying is the maximum, that the settlement is actually $75 million?

MR. MOYER: The settlement is actually $75 to $77 million. The $138.7 figure is really a point of reference for you—that is

the maximum claim of dumping duties that we feel could be made by the government.

Q. I see. So you actually cut that more or less in half, is that right?

MR. MOYER: More or less. Let me add one more complication and repeat one more wrinkle to that. The $138.7 figure relates solely to dumping duties. $66 million of the $77 relates to dumping, so its $66 against $138.7.

MR. HARTWIG: Over here.

Q. What is the connection between the announcement and the coming trip here, I think, in two days of the Japanese Prime Minister?

MR. MOYER: There's no direct connection in the sense that none of who has been working on this problem has been involved in any way with the upcoming visit of the Prime Minister. Indeed, my involvement in attempting to explore the possibilities of settlements predated my knowing that there was a visit forthcoming.

I think it may have been a factor for some of the companies in terms of the urgency or the timing that they might sense to the Japanese related companies, perhaps. But I think you have to conclude that it's a factor, although it would be a very minor one, quite a few state visits have come and gone since the dumping proceedings were instituted.

Q. Who, in fact, made the decision to expedite this case once it got Commerce and then settle on this particular figure?

MR. MOYER: The process works in the following way. The statutory provision that I mentioned earlier confers on the Secretary the ultimate authority to make such settlements.

It also requires that I, as General Counsel, make a recommendation to him as to the question of settlement. It further requires that I review and take into account reports from the Justice Department, U.S. attorney or a Customs officer assessing the strength of the government's claim, the likely

risk of litigation, the chances of our being able to recover the claims asserted.

That formally and technically is the process. As a practical actual matter, the process to explore the possibility of settlement occurred with the Secretary's concurrence. I would say that I, of the people in the Department with responsibilities relating directly to the Secretary, have been perhaps more involved than anyone else.

And in terms of the figures and the assessments, obviously a great many people have been involved because the figures and the data are voluminous.

Q. There has been a lot of criticism about this case—more publicity than anything that has been generated in some time. And I'm wondering if finally, Secretary Klutznick walked in the door and said get this off our backs and let's move on and said this will be fair, or whether this is just sort of a culmination of a process that's been moldering [*sic*] along for some time.

MR. MOYER: It's very important—and I think very important to the Secretary who is newly responsible for these—for the anti-dumping and counter-bailing [*sic*] duty laws—that the administration of those programs be conducted in a sensible, efficient, current, effective basis and recent changes in the law reflect heightened expectations in the Congress that that be the case.

We took over a program and the system in which there was some backlog and this is perhaps the most celebrated of the cases that we inherited.

We faced, at that point, a backlog going back a number of years. The Secretary concluded—I concluded that we should examine very carefully and very quickly whether settlement in this case made sense. After we made that initial settlement, the Secretary then gave the go-ahead to see if we could—if there was any likelihood of reaching a settlement on what we viewed as fair terms.

At the conclusion of that process, the Secretary made the final decision to approve the settlement that we intended to.

MR. HARTWIG: Over here, please.

Q. You said the case has been settled on very fair terms to the U.S. and you have settled 50% of what you could feasibly shoot for in court. Is that a good ratio by the standards of these kinds of court cases? And my second question is do you have a figure for the total value of the Japanese TV sets that have come in to the U.S. in this period—'71-'79?

MR. MOYER: Second question first: just over $2 billion.

Q. That is for the period '71 to '79?

MR. MOYER: That's correct. I can be corrected on that, but that's my recollection. Just over $2 billion. To answer your first question on the fairness of the settlement—one can employ a variety of yardsticks and I could do that somewhat superficially—50 cents on the dollar for commercial litigation, I think, is technically regarded as a high and fair settlement. But really, more responsive to your question, the fairness of any settlements necessarily depends on the magnitude of the risk in going forward with claims, the costs of going forward both in resources and in real dollars, the time involved. One must also take into account, I think, that to some extent time is money, and the payment of "x" dollars per day is worth more in present day dollars than a similar payment collected 5 years hence.

Assessing all of those factors, the strength of the legal claims and the risks in going through the process in full measure, in my judgment, is a very fair settlement.

Q. What happens to the investigations into illegal—allegedly illegal kickbacks that were being made—if I understand—by a grand jury across the country. This has been widely reported—

MR. MOYER: Criminal proceedings of any sort are unrelated to this settlement.

Q. I see. So what is this $10 million that we're talking about—maybe Mr. Caramagno might be able to address what exactly—

MR. MOYER: Those are civil penalties. I'll let Mr. Caramagno address that.

MR. CARAMAGNO: These are compromise [*sic*] we accepted in lieu of the possible assessment of penalties. We have only assessed one penalty in this case and the question is whether that was a valid assessment. We have assessed no other penalties. Some of our investigations are—and with repsect [*sic*] to cases about which we have knowledge and which there have been disclosure to—

Q. Are they criminal investigations or proceedings?

MR. CARAMAGNO: They may or may not proceed.

MR. HARTWIG: Other questions?

Q. You said earlier that there would be some further details on these 592 cases. I assume that that's what your [*sic*] referring to—these 4 cases and the breakdown of who the particular companies are and what the duties were?

MR. MOYER: There are 10 companies involved. Four have already executed settlement agreements. We can indicate the names of the companies without indicating any individual settlement amounts. Those four companies are Sears Roebuck, Penneys, Montgomery Wards and White Stores.

Incidentally, it may not be available yet, but there will be available a list of—a full list of the 22 companies that have signed agreements thus far.

Q. Could you explain again simply what this payment is about? These four companies have agreed to settle claims of $10 million for what?

MR. MOYER: For so-called section 592 cases. Those are civil investigations that relate to invoicing, recordkeeping, bookkeeping, processes associated with imports. I will refer the expert on my left.

MR. CARAMAGNO: Section 592 allows the assessment of penalties of foreign states [*sic*] against the Commerce of the United States by use of false statements, false practices and we were

investigating a variety of importers and manufacturers. Offers in compromise were made to it. We accepted those in lieu of going any further. The settlement procedure was relatively carefully considered in line with our usual mitigation process and we have guidelines for mitigating penalties. We try to do them in an orderly fashion. We consider litigation risks, the fact that we had not had the benefit of the other person's point of view, nor the benefit of complete investigation and we accepted settlements that we considered fair.

Q. This is the reverse side, therefore, of the criminal cases—

MR. CARAMAGNO: I wouldn't say it's the reverse side, it's the civil side.

Q. Of these civil cases which are not affected, you said, by this settlement.

MR. CARAMAGNO: No, very separate. The criminal cases that are—

Q. Was the Justice Department brought into this settlement procedure at all?

MR. MOYER: Well, I might clarify the role of the Justice Department because Justice is the signatory to many of these settlement agreements. It's [*sic*] participation in these agreements, however, is a function of pending collection suits, covering the 1971 to 1973 period. We will also have available for you, although I suspect we don't have them yet, some sample settlement agreement forms, if you are interested. They vary in some respects in that some companies have 592 cases, some didn't. Others were the subject of collection suits, while others were not.

The Justice Department participation in these settlements is limited to those civil collection actions relating to the 1971-1973 period.

MR. HARTWIG: Question back here.

Q. You say future reviews after these agreements will be based upon the procedure of the private trade agreement act

and not the commodity tax approach. Could you elaborate on that, I mean, is it—

MR. MOYER: Yes, I can elaborate to some extent. One of the issues in this proceeding was—involved the assessment of fair market value in Japan and one of the questions involved was how best to assess that value. In most cases, it is done in a transaction by transaction documentation fashion which involves simply going back and documenting the wholesale price with the comparable sales price in the home country.

For a variety of reasons, that proves not feasible for significant periods of time covered by this. As a result, in 1977, valuation of home market value was made by the so-called commodity tax basis. In a word, that is a procedure whereby Customs and the Treasury Department at that time utilized a formula incorporated in the tax code of Japan and used by the Japanese government in arriving at comparable prices for tax purposes. I'm oversimplifying a bit, but it's a shorthand formula method of arriving at fair market value in the home country.

Prospectively, after March 30, 1979, assessments will be made on the traditional documentation basis.

Q. Can you tell me which side that is a concession to? I mean, which side disliked it?

MR. MOYER: Well, it certainly was challenged by the importing company and was a central issue in this matter.

MR. HARTWIG: Any more questions?

Q. Is there any reason why you can't give us a breakdown—a dollar breakdown of the various settlements that have been made, I mean rather than this overall total?

MR. MOYER: I think that at this point it would be inappropriate for us to indicate on a company by company, dollar by dollar basis.

Q. When will you be doing that?

MR. MOYER: We frankly have concluded the last agreements just a few minutes ago, and my honest answer is we have not addressed that. Our inclination at this point is not to make that information available, but we shall review that.

Q. Can you do that? I mean, can you not make it available?

MR. MOYER: Well, that's what we will review.

MR. HARTWIG: One more question, over here.

Q. Can you state again the basis of your legal authority to settle these claims, because there seems to be some feeling on the Hill that Commerce, with the administering authority, does not have that power to settle claims, but that you are actually moving into rather dangerous domain.

MR. MOYER: I'd be happy to. It is Section 1617 of Title 19. That contains broad, almost categorical authority to compromise claims arising out of conference [*sic*] law. The result of the trade reorganization at the 1st of the year, a portion of that authority was transferred to the Secretary of Commerce, and specifically authority to settle claims arising under the anti-dumping and counter-bailing [*sic*] duty laws.

I have reviewed this issue. We have reviewed it with the Justice Department. I am satisfied that legal authority is ample.

MR. HARTWIG: Thank you very much, ladies and gentlemen.

Slip Op. 80-10

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE MALETZ, JUDGE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

Memorandum and Order on Plaintiff's Motion for a Preliminary Injunction

[Plaintiff's motion granted.]

Decided December 9, 1980

Frederick L. Ikenson and *Philip J. Curtis* on the brief for the plaintiff.

Alice Daniel, Assistant Attorney General (*David M. Cohen*, Director, Commercial Litigation Branch, on the brief), for the defendant.

MALETZ, Judge: Plaintiff, an American television manufacturer, moves for an order enjoining *pendente lite* the Secretary of Commerce, the Secretary of the Treasury, the Attorney General and the Commissioner of Customs, and their successors, agents and assigns, from implementing the terms of any settlement agreement entered into by or on behalf of the United States Department of Commerce, the United States Department of the Treasury, the United States Department of Justice and/or the United States Customs Service, and various importers of television receivers from Japan subject to the Secretary of the Treasury's finding of dumping, T.D. 71-76 (1971).

By way of background, on May 28, 1980 plaintiff brought an action in this court under section 516A of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. §1516a(a)(2)) challenging certain settlement agreements into which the United States had entered on April 28, 1980 with various importers of television receivers from Japan. The major portion of these settlement agreements related to claims arising out of a large backlog of unliquidated entries.

On June 27, 1980, plaintiff filed a verified complaint in which it detailed its grievances and alleged that the implementation of the settlement agreements would result in the unlawful forgiveness to plaintiff's competitors of hundreds of millions of dollars in antidumping liability on these unliquidated entries. As a first cause of action, the complaint asserted that the settlement was not authorized by 19 U.S.C. §1617 and thus was *ultra vires*, illegal and void.

Alternatively, as a second cause of action, the complaint alleged that even assuming 19 U.S.C. §1617 provided authority for the settlement, the Government officials who recommended and determined that the claims should be settled acted arbitrarily, capriciously, in bad faith and unlawfully. More specifically, the complaint alleged that the recommendations and the decision to settle the claims as well as the terms of the settlement were based on bad faith and improper motivations of persons in the Executive Branch. According to the complaint, the recommendations and decisions to settle, and the terms of the settlement were based primarily on political and other irrelevant considerations.

Following enactment of the Customs Courts Act of 1980, which became effective on November 1, 1980, plaintiff filed an amended complaint in this court on November 3, 1980 under 28 U.S.C. §1581(c) (a provision which gives the court jurisdiction over actions commenced under section 516A of the Tariff Act of 1930, as amended (19 U.S.C. §1516a)). Alternatively, the amended complaint was brought under 28 U.S.C. §1581(i) (a provision which was added by the Customs Courts Act of 1980

to grant broad residual jurisdictional authority to this court). It is undisputed that by virtue of §1581(i), this court has jurisdiction to entertain this action.

It is important to add by way of further background that on May 8, 1980, the Court of Appeals for the District of Columbia Circuit in *The Committee to Preserve American Television* (a.k.a. *Compact*) v. *Miller*, C.A.D.C. No. 79-1948, issued an injunction pending appeal which is the same in substance as the preliminary injunction sought by plaintiff here. However, the enactment of the Customs Courts Act of 1980 makes imminent the dissolution by the D.C. Circuit of its injunction in view of the exclusivity of subject matter jurisdiction which Congress has now vested in this court. Indeed, the appellants in the *Compact* case have filed a motion with the D.C. Circuit to transfer that case to this court. The Government, on the other hand, opposes the motion to transfer and urges that the D.C. Circuit dissolve its injunction pending appeal. In this posture the injunction pending appeal could be dissolved by the D.C. Circuit at any time. Given that circumstance, plaintiff's motion in this court for a preliminary injunction is ripe for decision at this time.

Nor is there any question as to the power of this court to issue a preliminary injunction in appropriate circumstances. For the Customs Courts Act of 1980 vests this court—renamed the United States Court of International Trade—with "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. §1585. Thus, the Act specifically authorizes the court to issue injunctions. 28 U.S.C. §2643(c)(1). What is more, Congress intended "to grant the Court of International Trade remedial powers co-exclusive with those of a federal district court. * * * [Therefore] [w]hen a party requests the court to grant injunctive relief, the court is to be guided by the same factors utilized by a federal district court when it considers a request for a preliminary injunction." H.R. Rep. No. 96-1235, 96th Cong. 2d Sess. 61 (1980).

The factors utilized by district courts in considering a request for a preliminary injunction are set out in the leading case of *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1958). There the court indicated that to prevail the petitioner must show (1) that there is a substantial likelihood that the petitioner will prevail on the merits; (2) that without the relief requested the petitioner will be irreparably injured; (3) that the issuance of the relief requested will not substantially harm other interested parties; and (4) that the public interest would be served by the relief requested. [1]

Recently, the D.C. Circuit in *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977), amplified these factors as follows:

> * * * [U]nder *Virginia Petroleum Jobbers* a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

Applying the *Virginia Petroleum/Holiday Tours* test to the present case, we find the following:

1. Likelihood that Plaintiff will Prevail on the Merits

The court has examined the record made in the case thus far, including the complaint; defendant's motion to dismiss for lack of jurisdiction and brief in support thereof; plaintiff's cross-motion for partial summary judgment on its first cause of

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[1] See also, e.g., *Asher* v. *Laird*, 475 F.2d 360, 362 (D.C. Cir. 1973); *Di Jub Leasing Corp.* v. *United States*, 1 CIT —, Slip Op. 80-9 at 15-16 (December 5, 1980).

action and its brief in support thereof and in opposition to defendant's motion to dismiss; defendant's cross-cross-motion for summary judgment and brief in support thereof and in opposition to plaintiff's motion for partial summary judgment; the amended complaint; and defendant's reply to plaintiff's opposition to defendant's motion to dismiss. [2] What is particularly significant is that several of the foregoing submissions set forth facts supported by accompanying exhibits with respect to the background of and circumstances surrounding the settlement agreements. Based on these facts which are largely uncontroverted, the court—without reference to plaintiff's first cause of action—is of the view that plaintiff has made out a substantial case on the merits on its alternative second cause of action alleging that Government officials in negotiating and executing the settlement agreements acted arbitrarily and in bad faith.

2. Irreparable Injury to Plaintiff

The court is of the opinion that if appropriate Government officials are not enjoined from implementing the settlement agreements, plaintiff stands to be irreparably injured. For one thing, plaintiff will have lost its right to judicial review. For another, the settlement if implemented would result in the allegedly illegal forgiveness of liability for hundreds of millions of dollars in dumping duties to plaintiff's competitors.

Defendant argues though that plaintiff's competitive position is not currently affected in an adverse manner by the importation of television receivers from Japan. Hence, defendant's position is that plaintiff would not be harmed by nonenforcement of the antidumping statutes with respect to past

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[2] In its reply to plaintiff's opposition to defendant's motion to dismiss, defendant agreed that by virtue of 28 U.S.C. §1581(i), as amended by the Customs Courts Act of 1980, the court has jurisdiction over the present action. Thus, defendant's motion to dismiss for lack of jurisdiction is now moot.

entries. However, Congress clearly recognized that domestic interests could be harmed by inadequate enforcement of the antidumping law with respect to past entries. This is evidenced by the administrative and judicial review made available by sections 751 and 516A of the Tariff Act of 1930, as amended (19 U.S.C. §§1675, 1516a), which enable American manufacturers to contest the amount of duty to be assessed on past entries. Even the section 751 annual review which is now being conducted involving television receivers from Japan does not pertain to current entries. Rather, the current investigation relates to the amount of duties to be assessed on entries made between April 1, 1979 and March 1, 1980. In short, Congress recognized that domestic industry could be injured by the failure to enforce the antidumping law adequately and provided a vehicle to assure that domestic interests could participate in administrative and judicial review.

3. The Effect on the Public Interest and on Third Parties

The defendant argues here—as it did in the Court of Appeals for the District of Columbia Circuit—that the enjoining of the settlement agreements would work a hardship on the public interest and third parties. Thus, the defendant states that the settlement agreements at issue were concluded on April 28, 1980 while the injunction pending appeal was not issued by the Court of Appeals until May 8, 1980. During the interim period, defendant states, Government agencies and private parties took a number of steps in reliance upon the agreements. Specifically, the Department of Justice caused the dismissal with prejudice of two collection suits. [3] Also, according to defendant, the Customs Service and the private parties to the agreements took unspecified steps also in reliance upon the agreements.

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[3] The dismissal of these two collection suits alone would not warrant the mooting of litigation challenging the legality of the settlement agreements, as apparently the Court of Appeals for the District of Columbia found.

It is to be noted, however, that the parties to the agreements were obviously concerned that the agreements could come under legal attack. For the agreements contained the following provision:

> 8. This Agreement shall be null and void in the event that there be, and upon, a judicial decision final by appeal or, if the time to appeal shall have expired without an appeal having been taken, that the United States did not have the right, power or authority to enter into this Agreement. Within ten (10) calendar days after such decision, the United States shall refund the consideration paid by the Company, pursuant to paragraph 2 above. Nevertheless, if, at the time the agreement be finally declared null and void, the entries of television receivers subject to T.D. 71-76 made prior to April 1, 1979, have been liquidated or reliquidated with no assessment of antidumping duties, and such liquidations or reliquidations have become final or conclusive upon all persons, the applicable consideration paid by the Company shall not be refunded.

Defendant proceeds to argue that unless the injunction is discontinued (and plaintiff's case is permitted to become moot), the settlement agreements might be repudiated. Such a development, defendant suggests, could lead to litigation with importers and "the diversion of substantial resources needed for the effective future enforcement of T.D. 71-76 into an effort to defend past actions." "The failure of this latter effort," defendant continues, "would result in the defeat of the very objective which plaintiff seeks to achieve—the payment of dumping duties by the importers of Japanese television sets during a substantial period of time—and the possible impairment of the effort to effectively enforce T.D. 71-76 in the future."

In essence, defendant's position is that the public interest would be best served by mooting the present controversy. But this course, precluding as it would judicial inquiry into the Government's alleged failure to administer the antidumping law with respect to television receivers from Japan, would scarcely be consistent with the public interest. For the public interest lies in the faithful execution by the Executive Branch of the laws enacted by Congress. In this proceeding, plaintiff

has raised serious issues concerning the Executive Branch's exercise of its responsibilities under the antidumping law with respect to television receivers from Japan. So considered, the mooting of this controversy, which is what would result in the absence of an injunction, would constitute a disservice to the public interest.

In view of the foregoing, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction is granted; and it is further

ORDERED that the Secretary of Commerce, the Secretary of the Treasury, the Attorney General, and the Commissioner of Customs, and their successors, agents, and assigns are enjoined, pending the resolution of this case, from implementing the terms of any settlement agreement entered into by or on behalf of the United States Department of Commerce, the United States Department of the Treasury, United States Department of Justice, and/or the United States Customs Service, and various importers of television receivers subject to T.D. 71-76; and it is further

ORDERED that the Secretary of the Treasury and the Commissioner of Customs and their successors, agents, and assigns are enjoined, pending the resolution of this case, from liquidating any entries of television receivers subject to the finding of dumping, T.D. 71-76, which were entered, or withdrawn from warehouse, for consumption on or prior to March 31, 1979.

/s/ Herbert N. Maletz
HERBERT N. MALETZ, Judge

Slip Op. 80-11

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE MALETZ, JUDGE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

Memorandum and Order on Defendant's Motion for a Protective Order

The court has before it defendant's second motion for an order relieving defendant of the obligation to respond to plaintiff's discovery, or, alternatively, to extend the time within which defendant must respond to plaintiff's discovery.

In considering this motion, the court has examined the record in the case thus far, including the complaint; defendant's motion to dismiss for lack of jurisdiction and brief in support thereof; plaintiff's cross-motion for partial summary judgment on its first cause of action and its brief in support thereof and in opposition to defendant's motion to dismiss; defendant's cross-cross-motion for summary judgment and brief in support thereof and in opposition to plaintiff's motion for partial summary judgment; the amended complaint; and defendant's reply to plaintiff's opposition to defendant's motion to dismiss.

On the basis of uncontroverted facts appearing in the above record (see *Zenith Radio Corporation* v. *United States*, 1 CIT—, Slip Op. 80-10 at 6-7, December 9, 1980), the court has concluded that plaintiff has made a sufficiently strong showing of bad faith so as to warrant discovery. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971); *KFC Nation-*

al Management Corp. v. *NLRB*, 497 F.2d 298, 305 (2d Cir. 1974); *National Nutritional Foods Assn.* v. *FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974); *Singer Sewing Machine Co.* v. *NLRB*, 329 F.2d 200, 208 (4th Cir. 1964); *Abbott Laboratories* v. *Harris*, 481 F. Supp. 74, 78 (N.D. Ill. 1979); *Tenneco Oil Co.* v. *Doe*, 475 F. Supp. 299, 316 (D. Del. 1979); *Quincy Oil Co., Inc.* v. *FEA*, 468 F. Supp. 383, 388 (D. Mass. 1979); *Ruppert* v. *Washington*, 366 F. Supp. 686, 690 (D.D.C. 1973), *aff'd*, 543 F.2d 417 (D.C. Cir. 1976); *Bank of Dearborn* v. *Saxon*, 244 F. Supp. 394, 402-403 (E.D. Mich. 1965); *Jarrott* v. *Scrivener*, 225 F. Supp. 827, 829 (D.D.C. 1964); *Union Savings Bank of Patchogue* v. *Saxon*, 209 F. Supp. 319 (D.D.C. 1962).

For the foregoing reasons it is hereby

ORDERED that defendant's motion for an order relieving it of the obligation to respond to plaintiff's discovery is denied, and it is further

ORDERED that defendant's motion in the alternative for an order extending the time within which it must respond to plaintiff's discovery is also denied, and it is further

ORDERED that defendant shall respond to Plaintiff's First Request for Production of Documents within 40 days after December 15, 1980, and defendant shall respond to Plaintiff's First Interrogatories within 50 days after December 15, 1980.

/s/ Herbert N. Maletz
HERBERT N. MALETZ, Judge
Dec. 12, 1980

Slip Op. 81-19

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE MALETZ, JUDGE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

On Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross-Motion for Summary Judgment

[Plaintiff's motion denied and defendant's motion granted in part and denied in part.]

Decided February 27, 1981

Frederick L. Ikenson and *Philip J. Curtis* for the plaintiff.

Thomas S. Martin, Acting Assistant Attorney General (*David M. Cohen*, Director, Commercial Litigation Branch, on the briefs), for the defendant.

MALETZ, Judge: Plaintiff, a domestic manufacturer of television sets, brought this action challenging as unlawful certain settlement agreements into which the United States had entered on April 28, 1980 with various importers of television sets from Japan. As a first cause of action, the complaint alleges that the settlement was not authorized by statute. Alternatively, as a second cause of action, the complaint alleges that even assuming the existence of statutory authority for the settlement, the Government officials who recommended and determined that the claims should be settled acted arbitrarily, capriciously, in bad faith and unlawfully. It is undisputed that by virtue of 28 U.S.C. § 1581(i) — which was

provided for by the Customs Courts Act of 1980 (94 Stat. 1727) — this court has jurisdiction to entertain the action.

Plaintiff has moved for partial summary judgment on its first cause of action and defendant has cross-moved for summary judgment on the entire case. [1]

The background facts are as follows: On March 10, 1971, the Secretary of the Treasury issued a finding of dumping of television sets from Japan, thereby making such sets subject to antidumping duties. [2] T.D. 71-76, 36 Fed. Reg. 4597 (1971). From the date of this finding through 1979, most of these duties were not collected. On March 28, 1980, the Secretary of Commerce [3] announced an administrative review of the dumping finding (45 Fed. Reg. 20511), as required by section 751 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979 (19 U.S.C. § 1675). [4] On April 28, 1980, prior to the

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[1] Plaintiff's motion for partial summary judgment was originally filed as a cross-motion to defendant's motion to dismiss for lack of jurisdiction, and defendant's cross-motion for summary judgment was originally filed as a cross-cross-motion. Since defendant's motion to dismiss was rendered moot by the passage of the Customs Courts Act of 1980, the present motions are referred to as "plaintiff's motion for partial summary judgment" and "defendant's cross-motion for summary judgment."

[2] The Secretary of the Treasury's dumping finding was made pursuant to section 201(a) of the Antidumping Act of 1921, as amended (19 U.S.C. § 160(a)), an enactment which was repealed by the Trade Agreements Act of 1979, Pub. L. No. 96-39, Title I, § 106(a), 93 Stat. 193. However, pursuant to section 106(a) of the Trade Agreements Act of 1979, this dumping finding remained in effect.

[3] The Secretary of the Treasury's responsibility to administer antidumping matters has been transferred to the Secretary of Commerce by Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69273 (1979).

[4] Section 751 requires the Secretary to conduct a periodic review and determination of antidumping duties.

completion of this administrative review, the Secretary of Commerce settled all claims for antidumping duties arising from entries of the sets from July 1, 1973 to March 31, 1979. Plaintiff then filed this action challenging the lawfulness of this settlement.

Against this background, we consider plaintiff's motion for partial summary judgment on its first cause of action. [5] Specifically, plaintiff contends that the settlement is not authorized by section 617 of the Tariff Act of 1930, as amended (19 U.S.C. § 1617) and is therefore *ultra vires*, illegal and void. Section 617 reads as follows:

> Upon a report by a customs officer, United States attorney, or any special attorney, having charge of *any claim arising under the customs laws*, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury. [Emphasis added.] [6]

According to plaintiff, section 617 only authorizes the settlement of *liquidated claims* for antidumping duties. [7] In this

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[5] Previously, this court concluded "that plaintiff has made out a substantial case on the merits on its alternative second cause of action * * *" and issued a preliminary injunction restraining the implementation of the settlement agreement. *Zenith Radio Corporation* v. *United States*, 1 CIT — , Slip Op. 80-10, p. 7 (Dec. 9, 1980). The court's memorandum and order specifically noted, however, that the decision to issue the preliminary injunction was made "without reference to plaintiff's first cause of action * * *." *Ibid.*

[6] The Secretary of the Treasury's functions under section 617 have been transferred to the Secretary of Commerce, insofar as those functions relate to the settlement of claims for antidumping duties. Reorg. Plan No. 3 of 1979, *supra*, § 5(a) (1) (G).

[7] Liquidation is the final computation of duties accruing on an entry. See 19 C.F.R. § 159.1. Most of the entries which are the subject of the disputed settlement are unliquidated.

connection, plaintiff observes—correctly—that the legislative history of section 617 is essentially silent. However, in support of its position that section 617 authorizes only the settlement of liquidated claims for duties, plaintiff relies heavily upon the history of Rev. Stat. § 3469 which was repealed in 1978. See 92 Stat. 2679.

Rev. Stat. § 3469 at the time relevant here read as follows:

> Upon a report by a district attorney, or any special attorney or agent having charge of *any claim in favor of the United States*, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the solicitor of the treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. * * * [Emphasis added.]

Based on the similarity of language between the two provisions, plaintiff argues that section 3469 was the precursor of section 617 and therefore that the case law and administrative construction of section 3469 apply for the most part to section 617.

As for case law, plaintiff relies on *United States* v. *George*, 25 F. Cas. 1277 (C.C.S.D.N.Y. 1869) which, it says, supports its position that section 617 authorizes only the settlement of liquidated claims. In *George*, certain informers claimed entitlement to a portion of sums that were paid to the Government under a compromise agreement. The informers contended that the sums constituted fines or penalties in which they had a right to share. The Government on the other hand argued that since the funds were paid by way of compromise under section 10 of the Act of March 3, 1863, 12 Stat. 740—which was a virtually identical predecessor provision to section 3469—such funds were duties and that the informers therefore were not entitled to a share thereof. The court rejected the Government's argument and held (1) that the compromise had no legal effect on the character of the funds and (2) that a portion of the funds constituted fines or penalties in which the informers

were entitled to share. Plaintiff emphasizes that the court in *George* added that section 10 "might well be held to confer no power in regard to claims not in suit." 25 F. Cas. at 1279. But this statement was simply dictum which can scarcely be regarded as dispositive of the issue here.

As for administrative construction, plaintiff relies upon various opinions of the Attorney General construing section 10 and its successor section 3469 in which the Attorney General concluded that those provisions were enacted for the benefit of the United States revenue and (1) did not permit the Secretary of the Treasury to exercise indirectly powers which Congress specifically conferred on other agencies; (2) did not authorize the settlement of claims for real property; (3) did not permit hardship to the debtor to be taken into consideration by the Secretary; and (4) did not include the Comptroller of the Treasury as an "agent." However, these opinions of the Attorney General have no relevance here.

Equally without merit is plaintiff's assertion in its opening brief that the legislative history of section 3469 shows that that section only authorized the settlement of claims for uncollected judgments. The fact of the matter is that section 3469 is not so limited as plaintiff itself concedes in its reply brief.

Nor is there any legislative history indicating that Congress intended that section 617 be construed in light of the history of section 3469. Section 617 was originally enacted in 1922 (42 Stat. 987) and provided specifically for the settlement of claims arising under the customs laws. Significantly, when section 617 was adopted, section 3469 was neither repealed nor modified and thus continued to provide authority for the settlement of claims other than those arising under the customs laws.

The important point is that the language of section 617 differs in several significant respects from the language of section 3469. For example, section 617 is applicable to "any claim arising under the customs laws," whereas section 3469 pertains to "any claim in favor of the United States." Thus the inescapable conclusion is that in enacting section 617, Congress intended to provide a mechanism for the settlement of claims

arising under the customs laws which would be different from the mechanism provided by section 3469. This consideration militates against construing section 617 in accordance with the history of section 3469. For "[w]here * * * words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning." *Klein* v. *Republic Steel Corp.*, 435 F.2d 762, 765-766 (3d Cir. 1970). See also, e.g., *United States* v. *Crocker-Anglo National Bank*, 277 F. Supp. 133, 155 (N.D. Cal. 1967); *Sol Kahaner & Bro.* v. *United States*, 71 Cust. Ct. 97, 102, C.D. 4480, 372 F. Supp. 1393, 1398 (1973), *aff'd*, 62 CCPA 35, C.A.D. 1141, 509 F.2d 1186 (1975).

What is more, the language of section 617 is clear and the court is therefore dutybound to interpret the section in accordance with its plain meaning. See, e.g., *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978). It is quite true that statutory clarity does not bar a court's consideration of legislative history. See, e.g., *Train* v. *Colorado Pub. Int. Research Group*, 426 U.S. 1, 10 (1976); *Hunt* v. *Nuclear Regulatory Commission*, 611 F.2d 332, 336 (10th Cir. 1979), *cert. denied*, 445 U.S. 906 (1980). Nonetheless, the plain language of a statute must prevail in the absence of legislative history clearly indicating that the Congressional intent differed from that manifested by the language used. See *United States* v. *Oregon*, 366 U.S. 643, 648 (1961), *reh. denied*, 368 U.S. 870 (1961); *United States* v. *United States Steel Corp.*, 482 F.2d 439, 444 (7th Cir. 1973), *cert. denied*, 414 U.S. 909 (1973). Measured by this standard, absent here is any legislative history indicating that Congress intended section 617 to be given a meaning other than one based on its plain language.

Regarding the plain language, plaintiff argues that the word "claim" as used in section 617 means only claims for liquidated duties, i.e., claims for a sum certain. However, it is axiomatic that a claim by the United States for the appropriate duties arises upon the entry of a shipment of merchandise into the customs territory of the United States. Indeed, imported mer-

chandise may not be released to an importer unless estimated duties or a bond for duties is deposited at the time of entry. 19 U.S.C. § 1505.

It is true that the amount of the claim for duties may be uncertain until liquidation occurs. Nevertheless, the claim for duties exists and an importer obtains possession of goods which he imports subject to the claim of the United States.

Here, the importers of television sets covered by the dumping finding obtained the goods but only subject to the claim of the United States for the duties to be ultimately assessed upon liquidation. Thus, the United States possessed a claim against the importers even though the exact amount of the claim had not been fixed through the process of liquidation. [8]

Alternatively, plaintiff argues that if section 617 is construed as authorizing the settlement of claims prior to the completion of the administrative review required by section 751 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979 (19 U.S.C. § 1675), Congress' purpose in passing the Trade Agreements Act, i.e., the speedy and efficient collection of antidumping duties, would be frustrated. While plaintiff cites no portion of the Trade Agreements Act or its legislative history explicitly stating that it was Congress' intent to limit the scope of secion 617, it argues that the passage of that Act impliedly limited the scope of that section.

This court should of course construe section 617 so as to give effect to the section as a whole. *Weinberger* v. *Hynson, West-*

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[8] In its ordinary meaning, the word "claim" is a broad comprehensive word including within its scope "a calling * * * for something due." *Webster's Third New International Dictionary of the English Language* (1968). A "claim" has been defined for purposes of the Federal Rules of Civil Procedure as "the aggregate of operative facts which give rise to a right enforceable in the courts." *Original Ballet Russe* v. *Ballet Theatre*, 133 F.2d 187, 189 (2d Cir. 1943). The fact that the exact amount of the claim is not fixed until liquidation is irrelevant to the question of whether a "claim" exists prior to that date.

cott & Dunning, 412 U.S. 609, 633 (1973); *Certified Color Mfrs. Ass'n* v. *Mathews*, 543 F.2d 284, 296 (D.C. Cir. 1976). Moreover, it is presumed that in enacting section 751 Congress was aware of its prior enactment of section 617. See, e.g., *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979); *In re Vinarsky*, 287 F. Supp. 446, 449 (N.D.N.Y. 1968). And it is also presumed that Congress intended both statutes to be interpreted as fully effective. See, e.g., *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

Obviously, these presumptions are not irrebuttable. Nevertheless, repeal of a statute by implication is not favored. *FAA Administrator* v. *Robertson*, 422 U.S. 255, 265 (1975). Further, this court should avoid an interpretation of section 617 rendering it only partially effective. *Certified Color Mfrs. Ass'n* v. *Mathews, supra*, 543 F.2d at 296. Thus sections 617 and 751 are each to be regarded as effective unless there is clear indication that Congress intended otherwise. *FAA Administrator* v. *Robertson, supra*, 422 U.S. at 266. Section 751 should therefore not be read to create an implied exception to, or limitation of, section 617 in the absence of a demonstrated repugnancy between the two provisions. *Morton* v. *Mancari, supra*, 417 U.S. at 551.

No such repugnancy exists here since the two provisions reflect different Congressional concerns and apply to different functions of the Secretary. The purpose of section 617 is to provide the Secretary with the authority to settle claims for duties and to outline the procedures to be followed and the factors to be weighed in the course of determining whether a given claim for duties should be settled.

The purpose of section 751 is entirely different. [9] That section provides in part that where there has been a finding of

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[9] The relevant portions of section 751 (19 U.S.C. § 1675) read as follows:

(a) *Periodic review of amount of duty.*—

dumping, the Secretary shall review and determine the amount of antidumping duty to be assessed by determining the

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(1) *In general.*—At least once during each 12-month period beginning on the anniversary of the date of publication * * * an antidumping duty order under this title or a finding under the Antidumping Act, 1921, * * * the administering authority [i.e., the Secretary of Commerce], after publication of notice of such review in the Federal Register, shall—

* * * * * * *

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, * * *

* * * * * * *

and shall publish the results of such review, together with notice of any * * * estimated duty to be deposited * * * in the Federal Register.

(2) *Determination of antidumping duties.*—For the purpose of paragraph (1)(B), the administering authority shall determine—

(A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and

(B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.

The administering authority, without revealing confidential information, shall publish notice of the results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

* * * * * * *

(d) *Hearings.*—Whenever the administering authority of the Commission conducts a review under this section it shall, upon the request of any interested party, hold a hearing in accordance with section 774(b) in connection with that review.

difference between the foreign market value and United States price of the imported merchandise. Upon the request of an interested party, the Secretary must hold a hearing regarding his review and determination of antidumping duties. These procedures are designed to facilitate the speedy assessment of antidumping duties and to provide designated parties a greater role in these determinations. See H.R. Rep. No. 96-317, 96th Cong., 1st Sess. 72 (1979); S. Rep. No. 96-249, 96th Cong., 1st Sess. 80-81 (1979). It is to be added that these determinations are subject to judicial review under section 516A of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a).

There is no conflict between the procedures required by section 751 and those required by section 617. Under section 617 before the Secretary may settle a claim, he must receive a report from the Government official having charge of the claim showing "the facts upon which [the] claim is based, the probabilities of a recovery and the terms upon which the [claim] may be compromised * * *." Upon receipt of this report, and upon the recommendation of the General Counsel of the Department of Commerce that the claim be compromised, the Secretary may settle the claim. Any person adversely affected by the decision to settle may then seek judicial review of the Secretary's action. Considering that judicial review is thus available and that settlement may expedite the collection of antidumping duties, these procedures do not frustrate the Congressional purpose underlying section 751.

In sum, section 617 and section 751 are separate and distinct statutes. Nothing in the terms or the legislative history of section 751 in any way refers or relates to, much less derogates from, the Secretary's authority under section 617. Clearly, had Congress intended that the authority contained in section 617 be modified in any way by the Trade Agreements Act of 1979, it would have so stated. Given these facts, the court cannot agree with plaintiff's contention to the effect that Congress impliedly limited the scope of section 617 when it enacted section 751 into law.

In view of the foregoing, plaintiff's motion for partial summary judgment on its first cause of action is denied; defendant's cross-motion for summary judgment is granted as to plaintiff's first cause of action and denied without prejudice as to plaintiff's second cause of action for the reasons stated in this court's memorandum and order of December 9, 1980. See note 5, *supra*.

/s/ Herbert N. Maletz
HERBERT N. MALETZ, Judge
Feb. 27, 1981

Slip Op. 82-51

UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE MALETZ, JUDGE

Court No. 80-5-00861

ZENITH RADIO CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

Dated: June 29, 1982
Memorandum and Order

MALETZ, Judge: This is a motion by the Government to dissolve the preliminary injunction in this case restraining the Government from implementing settlement agreements it entered into with importers of television receivers from Japan. The Government argues that given the decision by the Court of Customs and Patent Appeals in *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, No. 81-24 (March 11, 1982) (petition for rehearing denied on May 13, 1982), that this court did not have jurisdiction to entertain this action, it is clear that Zenith has no chance of success on the merits of its case and that the public interest weighs heavily in favor of a dissolution of the preliminary injunction.

At the outset, it will be noted that the Court of Customs and Patent Appeals has (over the Government's objection) granted Zenith's motion to stay its mandate in *Montgomery Ward* until July 21, 1982 to afford Zenith time to file a petition for a writ of certiorari to the Supreme Court. Nor is there any doubt that important and novel questions of statutory and administrative law are presented for Supreme Court review. But were the preliminary injunction to be dissolved, the Government would

implement the settlement agreements, thus mooting the controversy and preventing the Supreme Court from exercising jurisdiction to decide the questions, should it elect to do so.

The Government, however, suggests that if this court dissolves the preliminary injunction, Zenith could still seek an injunction pending the filing of a petition for certiorari from the Court of Customs and Patent Appeals and if that application is denied, seek an injunction from the Supreme Court. But such a course would be singularly inappropriate. For it would create an emergency situation, which in turn would generate a wasteful and hurried effort by members of the judiciary and the parties—at a time when Zenith has represented that its petition for certiorari is soon to be filed.

The motion to dissolve the preliminary injunction is denied.

/s/ Herbert N. Maletz
HERBERT N. MALETZ, Judge

Office - Supreme Court, U.S.
FILED
SEP 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-166

In the Supreme Court of the United States

OCTOBER TERM, 1982

ZENITH RADIO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND
MONTGOMERY WARD & CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of International Trade lacked jurisdiction over petitioner's challenge to settlement agreements by which the Secretary of Commerce, the Secretary of the Treasury, and the Attorney General, acting pursuant to 19 U.S.C. 1617, compromised claims against 22 importers with respect to dumping duties and civil penalty claims arising out of the importation of Japanese-manufactured television sets prior to April 1, 1979.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 14

Conclusion 18

TABLE OF AUTHORITIES

Cases:

Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 18

District of Columbia v. *Schramm*, 631 F. 2d 854 17

Equity Funding Corp of America Securities Litigation, In re, 603 F. 2d 1353 16

Greater New York Hospital Association v. *Mathews*, 536 F. 2d 494 17

Local 1219, American Federation of Government Employees v. *Donovan*, No. 81-2284 (D.C. Cir. July 13, 1982) 14

Louisiana v. *McAdoo*, 234 U.S. 627 16

Morton v. *Mancari*, 417 U.S. 535 15

Regional Rail Reorganization Act Cases, 419 U.S. 102 14

Smith v. *South Side Loan Co.*, 567 F. 2d 306 16

Southern Ry. v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 16

Page

Cases—Continued:

TVA v. *Hill*, 437 U.S. 153 15

United States v. *Morgan*, 313 U.S. 409 12

Statutes and regulation:

Administrative Procedure Act, 5 U.S.C. 702 *et seq.* 8

Antidumping Act of 1921, 19 U.S.C. 160 *et seq.* (current version codified at 19 U.S.C. (Supp. IV) 1673 *et seq.* 2

19 U.S.C. 168 3
19 U.S.C. (Supp. IV) 1500(a) 3
19 U.S.C. (Supp. IV) 1673h 3

Rev. Stat. 3469 (1878 ed.) (Act of Mar. 3, 1863, ch. 76, Section 10, 12 Stat. 740) 8, 14

Tariff Act of 1930:

19 U.S.C. (Supp. IV) 1592 7
19 U.S.C. 1617 ... 7, 8, 9, 11, 12, 14, 15, 16, 17

Trade Agreements Act of 1979:

19 U.S.C. (Supp. IV) 1516a 8, 11
19 U.S.C. (Supp. IV) 1516a(a)(2) 8
19 U.S.C. (Supp. IV) 1675 8

28 U.S.C. 516 8

28 U.S.C. 519 8

28 U.S.C. (Supp. IV) 1581(c) 8

28 U.S.C. (Supp. IV) 1581(i) 8

19 C.F.R. 159.1 3

Page

Miscellaneous:

Administration of the Antidumping Act, 1921, Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means, 95th Cong., 2d Sess. (1978) 5

Exec. Order No. 12188, 45 Fed. Reg. 989 (1980) 5, 7, 17

Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979) 5-6, 8, 17

T.D. 71-76, 36 Fed. Reg. 4597 (1971) 2, 5, 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-166

ZENITH RADIO CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA AND
MONTGOMERY WARD & CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Customs and Patent Appeals (Pet. App. 1a-20a) is reported at 673 F. 2d 1254. An amendment to that opinion dated May 13, 1982 (Pet. App. 29a-30a) is not yet reported. The May 13, 1981, order of the Court of International Trade (Pet. App. 21a-26a) is reported at 15 Cust. Bull. & Dec. No. 23,106; the February 27, 1981, order of the same court (Pet. App. 99a-109a) is not reported.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on March 11, 1982. A petition for rehearing was denied on May 13, 1982 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on July 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

STATEMENT

1. Petitioner, a domestic manufacturer of television sets, challenges the validity of settlement agreements entered into between 22 importers of television sets and the United States Departments of Commerce, Treasury, and Justice involving dumping-duty claims for television sets imported from Japan between July 1, 1973, and March 31, 1979.[1]

In 1971, the Treasury Department found that certain Japanese television sets were being "dumped" in the United States; *i.e.*, the sets were being sold here for less than their market value in Japan. T.D. 71-76, 36 Fed. Reg. 4597 (1971). Pursuant to the Antidumping Act of 1921,[2] then in force, the Customs Service was therefore required to determine the United States purchase price (or exporter's sales price) of each importation (entry) of television receivers covered by the dumping finding and to compare this price to the "foreign market value" (the wholesale price in the Japanese market) of comparable receivers. If the purchase price of any entry was less than its "foreign market value," adjusted for differences in circumstances of sale,[3] the

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[1]The factual background of this case is detailed in the affidavits of Robert H. Mundheim, General Counsel, Department of the Treasury ("Mundheim Aff."), and Robert E. Chasen, Commissioner of Customs ("Chasen Aff."), and the declaration of Homer E. Moyer, Jr., General Counsel, Department of Commerce ("Moyer Decl."), which were attached to the government's Motion to Dismiss filed in the Court of International Trade.

[2]19 U.S.C. 160 *et seq.* (1976) (current version codified at 19 U.S.C. (Supp. IV) 1673 *et seq.*).

[3]Pursuant to the Antidumping Act of 1921, the Secretary of the Treasury was empowered to adjust the foreign market value of imported goods when he found that differences in the wholesale quantities in which the imported goods were sold in their principal market, or other factors, impacted upon the disparity between the United States purchase price and the foreign market value.

Customs Service was required to assess an additional duty upon the entry equal to this difference or "margin."

The Customs Service encountered substantial difficulty in determining the margins on the television imports subject to the dumping finding (see Mundheim Aff. para. 7). Part of this difficulty resulted from the sheer magnitude of the task, compounded by the fact that Japanese manufacturers were reluctant to submit timely information upon which "foreign market value" could be determined (Chasen Aff. paras. 25-28). In addition, some of the information submitted was subject to grave doubt as to its reliability (*id.* at paras. 29-32). As a result, very few entries were liquidated[4] between 1971 and 1978 (Chasen Aff. paras. 19, 24). Limited liquidations occurred only in 1972, 1973 and 1976 (*ibid.*).

Due to the inability of the Customs Service to liquidate entries on a current basis, a large backlog of entries accumulated. In order to eliminate this backlog, the Commissioner of Customs proposed to the General Counsel of the Treasury, who then possessed authority to direct the administration of the antidumping law, that "foreign market value" be determined upon the basis of the Japanese Commodity Tax, rather than upon the basis of information submitted by the Japanese manufacturers (Mundheim Aff. para. 6).[5] The Japanese Commodity Tax is based on a percentage of the factory wholesale price and is imposed upon all television receivers sold in Japan (see Chasen Aff. paras. 33, 34). The Commissioner concluded that the factory wholesale price, as it is computed in determining the Japanese Commodity Tax, could be used to set the "foreign market value"

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[4]"Liquidation" is the final computation of duties accruing on an entry of goods into the United States. See 19 C.F.R. 159.1.

[5]Authority for adopting this new method of computing the foreign market value was premised on 19 U.S.C. 168 (1976) (currently codified at 19 U.S.C. (Supp. IV) 1673h) and 19 U.S.C. (Supp. IV) 1500(a).

of the imported television sets because that price so closely approximated the foreign market value of sets sold in Japan (*id.* at para. 34).[6] The Commissioner also proposed to utilize invoice prices to determine the purchase price or exporter's sales price.[7]

The General Counsel of the Treasury and the Commissioner of Customs thereafter agreed upon the following course of action: (1) on March 31, 1978, all entries through July 1973 would be liquidated utilizing the approach recommended by the Commissioner of Customs; (2) no adjustments in the "foreign market value" derived from the formula would be allowed; (3) after these liquidations, the Customs Service would review the expected protests in order to determine (a) the legal validity of the Commodity Tax approaeh, and (b) whether any adjustments for differences in circumstances of sale (other than those already incorporated into the formula) should be made to the foreign market value as determined by means of the Commodity Tax formula (see Chasen Aff. para 38; Mundheim Aff. paras. 6, 22). On March 31, 1978, numerous entries were liquidated and a total of $46 million in dumping duties was

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[6]There are two methods for calculating the Japanese Commodity Tax. Manufacturers may report the actual factory wholesale price of their television receivers, or apply a formula to the retail price in order to work backward to the factory wholesale price (Administrative Record, Document B at 5). The Commissioner proposed to utilize the second method of computing the tax, so that the "foreign market value" could be calculated by means of published Japanese retail price information (Administrative Record, Document RR).

[7]The Commissioner proposed to utilize invoice prices despite evidence that some purchase prices were actually lower than those reported to the Customs Service, due to concealed rebates (Administrative Record, Document B at 27). The decision to use invoice prices rather than "true" prices (reported prices less the rebates) was made to avoid jeopardizing pending criminal investigations into the rebate scheme.

imposed (Chasen Aff. para. 36). Subsequently, in December 1978 and June 1979, additional entries were liquidated and assessed, with dumping duties totaling approximately $32 million (see *id.* at para. 52).

Several importers paid the duties assessed as a result of the March 31, 1978, liquidations, but 699 protests were also filed (Mundheim Aff. para. 26). During the course of its review of these protests, the Customs Service determined that many of the protests would be granted in part (largely due to allowance of additional claimed adjustments to the "foreign market value" as determined by means of the Commodity Tax formula). The Commissioner therefore offered to defer collection efforts in return for the payment of a portion of the duties and the tender of an interest bearing promissory note for the remainder of the duties ultimately found to be due after action on the protests (Chasen Aff. paras. 39-50). Recalcitrant importers who did not accept this offer were referred to the Department of Justice, which instituted suit against them and their sureties.[8]

In January 1980, the President transferred responsibility for administration of the antidumping laws from the Department of the Treasury to the Department of Commerce. Exec. Order No. 12188, 45 Fed. Reg. 989 (1980);

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[8]During this period, Ambassador Strauss, Special Trade Representative, entered into an Orderly Marketing Agreement with the government of Japan that regulated the number of Japanese television receivers exported to this country. The United States interpreted this agreement as requiring an expeditious resolution of the problem caused by the backlog of unliquidated entries subject to T.D. 71-76. The agreement, however, was never viewed as, and never had the effect of, requiring any action inconsistent with the federal antidumping statute. See *Administration of the Antidumping Act, 1921, Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. 259, 262 (1978).

Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979). The General Counsel of the Commerce Department reviewed the history of the administration of T.D. 71-76 and consulted with the Commissioner of Customs and a number of other agencies concerning the matter (Moyer Decl. paras. 4-10). He was informed that the protests filed to the March 31, 1978, liquidations, if successful, would reduce the duties assessed from $46 million to approximately $8 million (*id.* at attachment A, p. 4). He was also informed that, based upon the experience gained from reviewing the protests, the maximum amount that could be claimed utilizing the Commodity Tax formula for entries through March 31, 1979, was $138.7 million (*id.* at para. 8). Finally, the General Counsel was informed, and concluded himself, that there was some doubt that the courts would sustain the use of the Commodity Tax formula as a means of determining "foreign market value" (*id.* at para. 9).[9]

Accordingly, the General Counsel of the Commerce Department began exploring the possibility of settling with various importers. He first determined what proportion of the maximum $138.7 million in duties that could be assessed pursuant to the Commodity Tax formula would be attributable to each importer (Moyer Decl. para. 12). For each importer, he then analyzed a number of factors relating to litigation risks and other considerations appropriate to reaching reasonable settlement amounts (*ibid.*). Finally, after considering the appropriateness of the total settlement amount, the General Counsel reached a non-negotiable settlement figure for each importer (*ibid.*).

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[9]In addition, the General Counsel realized that, given the enormous amount of data involved, the administrative difficulties inherent in the calculation and assessment process, and the certainty of widespread litigation, it could take years for the government to collect the duties assessed pursuant to the Commodity Tax formula (Moyer Decl. at Attachment A).

On April 28, 1980, the General Counsel recommended that the Secretary of Commerce settle all claims for dumping duties on Japanese televisions imported through March 31, 1979 (Moyer Decl. para. 14). The Secretary approved the recommendation and the General Counsel proceeded to implement that decision (*ibid.*). The agreements ultimately reached provided, *inter alia*, that (Administrative Record, Documents G through BB): (1) the importers would remit payments to the government totaling $77 million; (2) in return for these payments, the responsible agencies of the United States would (a) dismiss with prejudice the suits for the collection of duties assessed upon entries made prior to July 1, 1973, (b) abandon certain further administrative investigations concerning the possible imposition of civil penalties pursuant to 19 U.S.C. (Supp. IV) 1592, (c) issue instructions within 10 days to Customs officers to liquidate entries made prior to March 31, 1979; (3) the importers would abandon their right to challenge in the Customs Court the assessment of duties made prior to March 31, 1979; and (4) T.D. 71-76 would remain in effect and would be administered for entries after March 31, 1979, in accordance with the new antidumping amendments to the Tariff Act of 1930, as added by the Trade Agreements Act of 1979.

The portion of the agreements relating to claims for dumping duties and alleged violations of 19 U.S.C. (Supp. IV) 1592 were executed on behalf of the government by the Departments of Commerce and the Treasury pursuant to 19 U.S.C. 1617.[10] See Exec. Order No. 12188, *supra*;

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[10]Section 1617 provides:

> Upon a report by a customs officer, United States Attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

Reorg. Plan No. 3, *supra*. The agreements dismissing the collection suits were executed by the Department of Justice pursuant to 28 U.S.C. 516, 519.

2. Petitioner challenged the settlement agreements in the Court of International Trade (CIT) (formerly the Customs Court) on two grounds (Pet. App. 47a-62a). First, petitioner alleged that the settlements were *ultra vires*, beyond the authority vested in the Commerce and Treasury Departments by 19 U.S.C. 1617, and in violation of congressional will as expressed in the Trade Agreements Act of 1979, 19 U.S.C. (Supp. IV) 1516a and 1675. Second, petitioner alleged that even if the agreements were authorized by Section 1617, they should be set aside because they were negotiated in bad faith. Review was sought under Section 516A(a)(2) of the Trade Agreements Act (19 U.S.C. (Supp. IV) 1516a(a)(2)), and the Administrative Procedure Act (5 U.S.C. 702 *et seq.*). Jurisdiction was based on 28 U.S.C. (Supp. IV) 1581(c) and (i).

On February 27, 1981, the CIT granted the government's motion for summary judgment with regard to Count I (Pet. App. 99a-109a). The court found that the language of Section 1617 clearly authorized the compromise of "any claim arising under the customs laws" (19 U.S.C. 1617; Pet. App. 104a). The court rejected a restrictive construction of Section 1617, propounded by petitioner, that would have limited the statute solely to compromises of liquidated claims. Petitioner based this restrictive reading of Section 1617 on a similarly limited reading of an earlier statute, Rev. Stat. 3469 (1878 ed.) (Act of Mar. 3, 1863, ch. 76, Section 10, 12 Stat. 740). The court, however, found no basis for limiting either Section 1617 or Rev. Stat. 3469 to compromises of liquidated claims. Rather, in the absence of any legislative history to the contrary, the court held that the plain language of Section 1617, which authorized compromise of "any claim," was controlling (Pet. App. 102a-105a).

The court also rejected petitioner's argument that the Trade Agreements Act implicitly modified the compromise authority granted by Section 1617. The court found nothing in the legislative history of the Trade Agreements Act to suggest modification of the compromise power, noting that repeals by implication are not favored (Pet. App. 105a-106a). Nor did the court find any repugnancy between the two provisions (*id.* at 106a-108a; footnote omitted):

> No * * * repugnancy exists here since the two provisions reflect different Congressional concerns and apply to different functions of the Secretary. The purpose of section [1617] is to provide the Secretary with the authority to settle claims for duties and to outline the procedures to be followed and the factors to be weighed in the course of determining whether a given claim for duties should be settled.
>
> The purpose of section 751 [of the Tariff Act, added by the Trade Agreements Act] is entirely different. That section provides in part that where there has been a finding of dumping, the Secretary shall review and determine the amount of antidumping duty to be assessed by determining the difference between the foreign market value and United States price of the imported merchandise. Upon the request of an interested party, the Secretary must hold a hearing regarding his review and determination of antidumping duties. These procedures are designed to facilitate the speedy assessment of antidumping duties and to provide designated parties a greater role in these determinations. See H.R. Rep. No. 96-317, 96th Cong., 1st Sess. 72 (1979); S. Rep. No. 96-249, 96th Cong., 1st Sess. 80-81 (1979). It is to be added that these determinations are subject to judicial review under section 516A of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a).

The court concluded (*id.* at 108a):

> In sum, section [1617] and section 751 are separate and distinct statutes. Nothing in the terms or the legislative history of section 751 in any way refers or relates to, much less derogates from, the Secretary's authority under section [1617]. Clearly, had Congress intended that the authority contained in section [1617] be modified in any way by the Trade Agreements Act of 1979, it would have so stated. Given these facts, the court cannot agree with plaintiff's contention to the effect that Congress impliedly limited the scope of section [1617] when it enacted section 751 into law.

The court therefore granted summary judgment to the government on Count 1. The court, however, denied summary judgment as to Count 2, based on an earlier conclusion that petitioner had made a "sufficient" showing of bad faith (Pet. App. 101a n.5, 109a; 92a-93a).

With the case proceeding on Count 2, petitioner moved to compel production by the United States of certain documents, including the investigative file compiled by the Customs Service on television importations by respondent Montgomery Ward & Co., Inc. (Wards). Wards was permitted to intervene for the sole purpose of opposing the motion for production of that file. On May 13, 1981, the CIT granted petitioner's motion for production of the file under a protective order (Pet. App. 21a). Following denial of rehearing, Wards appealed to the Court of Customs and Patent Appeals (CCPA), where the United States was granted leave to intervene as an appellant (*id.* at 1a).

3. The CCPA held that it had jurisdiction over the appeal (Pet. App. 8a-9a) and then considered the question whether the CIT could properly review the settlements.[11] Initially, the court rejected petitioner's assertion that the government had no statutory authority to settle the antidumping claims at issue here. The CCPA, like the CIT, concluded that 19 U.S.C. 1617 provided ample authority "for settlement of antidumping proceedings" (Pet. App. 9a-10a).

Next, the court considered the claimed bases for review under petitioner's "bad faith" theory. Review could not be had under 19 U.S.C. (Supp. IV) 1516a, the CCPA held, because that section only provides for judicial review of administrative "determinations" made pursuant to the Trade Agreements Act, not of settlements made pursuant to Section 1617. "A settlement agreement is not an administrative review of an antidumping order resulting in a 'determination' * * *." (Pet. App. 11a).

The court also rejected petitioner's contention that the substantive and procedural requirements of the Trade Agreements Act could be superimposed upon a settlement authorized by Section 1617. Petitioner "does not dispute that the procedures set out in 19 U.S.C. 1617 were followed but [instead] asks the court to find that the procedures of 19 U.S.C. 1675 are superimposed [upon section 1617], thus

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[11]Petitioner contends (Pet. 9) that the issues decided by the CCPA were not briefed. However, both the United States and Wards challenged the district court's authority to allow discovery on petitioner's second cause of action. Petitioner replied (Brief for Appellee 16): "[T]he question of whether appellee should have been allowed to conduct discovery is not collateral to but central to appellee's litigation against the Government. The invitation to this Court by Wards (and the Government) to reach this broad issue should be declined." Moreover, the issues were later fully briefed in support of and in opposition to the petition for rehearing.

giving [petitioner] a right to a hearing which it says would encompass the terms of settlement" (Pet. App. 16a, footnote omitted). However, the CCPA remarked that "[w]e see no reasonable basis for placing such a limitation on the Secretary's authority under [Section 1617] and conclude there is none" (*ibid.*). Thus, the court held, petitioner's challenge to the settlements must be directed solely to Section 1617, and under that statute petitioner "was not entitled to a hearing or to be consulted regarding the considerations entering into the terms accepted by the Secretary in settlement of these claims" (*ibid.*).

Finally, the court rejected petitioner's invitation to "look behind the apparent regularity of the procedures into the motives for settlement" (Pet. App. 17a). Relying on *United States* v. *Morgan*, 313 U.S. 409, 421-422 (1941), the court held that petitioner could not "inquire into the merits of the settlement or into the Secretary's mental processes * * *" (Pet. App. 18a). Petitioner's discovery request, however, bore out the fact that such prohibited probing "is [petitioner's] objective" (*id.* at 18a-19a; footnotes omitted):

> The request for the Wards file bears on what figures the Secretary may have considered in arriving at settlement. Proving that the estimate in the report to him was lower than what Zenith considers reasonable does not destroy the lawfulness of his decision. Currency fluctuations can play a role in evaluation. Moreover, the dollar amount agreed upon may have been the best figure which could be negotiated regardless of the size of the claim. In any event, it may well be that other considerations were of greater significance than the precise dollar amount of the Government claims. The settlement agreement required more from the importers than the payment of money. Not only were any possible challenges to the assessment of duties expressly waived, but also concessions were obtained requiring

> cooperation in submitting data and information with respect to future enforcement. A tremendous backlog of cases was inherited by the Secretary which may well have interfered with current work of his Department not only in this area but in all areas of his responsibility under the Act. We do not know what weight he gave to each of these considerations and, in any event, these are not matters for which the court may demand answers.

In conclusion, the court explained why the settlement agreements at issue here are singularly inappropriate for judicial review (Pet. App. 19a-20a, footnote omitted):

> To require an explanation for this type of discretionary Executive action fundamentally changes the nature and scope of judicial review. Moreover, a court cannot infer fraud or bad faith because the Secretary did not achieve as advantageous a settlement as the court may believe could have been made. Nor is it appropriate to infer bad faith in the Secretary's decision from the alleged transgressions of predecessors. The decision to settle under attack here was required to be and was the personal decision of the Secretary. * * * Zenith includes in its complaint no more than perfunctory allegations of impropriety in the actions by the Secretary and his advisors.
>
> * * * * *
>
> The Zenith complaint is manifestly not directed to correction of procedural irregularity. It does not seek to have the settlement set aside until the requirements of 19 U.S.C. 1617 are properly met. Rather it seeks through the power of the court to prevent settlement.

ARGUMENT

The decision of the Court of Customs and Patent Appeals is correct and does not conflict with the ruling of any other court.[12] Petitioner's unsupported contentions do not warrant review by this Court.

1. Petitioner first contends (Pet. 11) that the Trade Agreements Act of 1979 modified the authority granted to the Executive Branch by 19 U.S.C. 1617 to compromise "any claim arising under the customs laws." Petitioner cites absolutely no authoritative support for its position, however, relying instead (Pet. 12 n.15) on the legislative history and administrative interpretations of another statute, Rev. Stat. 3469 (1878 ed.), the relevance of which was expressly rejected by the CIT (Pet. App. 102a-105a) and implicitly rejected by the CCPA (*id.* at 9a-10a).[13]

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[12] *Local 1219, American Federation of Government Employees* v. *Donovan*, No. 81-2284 (D.C. Cir. July 13, 1982), cited by amicus curiae COMPACT (Amicus Br. 9), does not conflict with the decision below. First, the rights compromised by the government in that case were those of the union members to a fair election. Here, the government is compromising its own rights. Second, without conceding that *Local 1219* was correctly decided, we note that the regulation authorizing settlement in that case required that a settlement provide "appropriate remedial action" (slip op. 8), an arguably substantive standard. In the instant case, 19 U.S.C. 1617 provides no substantive standard for review of a compromise effected under its terms. Therefore, while there may have been substantive law to apply in *Local 1219*, there is none here.

[13] Petitioner also relies upon a letter written by a single Member of Congress to an official of the Commerce Department, concerning the Trade Agreements Act of 1979 (Pet. 11 n.14). This letter, however, which was written after the Trade Agreements Act was enacted and which does not even purport to reflect opinions expressed in the course of congressional debate, cannot justify a holding that the authority contained in Section 1617 was repealed by implication. See, *e.g.*, *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

The Trade Agreements Act itself does not refer at all to the compromise authority contained in Section 1617, and nothing in its legislative history indicates a congressional intent to affect that authority. As the CIT correctly held, since Section 1617 and the Trade Agreements Act "reflect different Congressional concerns and apply to different functions of the Secretary" (Pet. App. 106a), the two are easily reconciled and both may be given full effect. *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). It would "surely do violence to the 'cardinal rule * * * that repeals by implication are not favored' ", *TVA* v. *Hill*, 437 U.S. 153, 189 (1978), to hold, as petitioner asserts, that the Trade Agreements Act of 1979 implicitly repealed the authority contained in Section 1617 insofar as it pertains to claims for dumping duties.

Petitioner's argument, at bottom, amounts to nothing more than a wistful assertion that Congress logically could not have intended the Executive Branch to shortcut the procedures created by the Trade Agreements Act by settling dumping claims under Section 1617. But that is like arguing that the United States may not settle civil cases or accept plea bargains in criminal cases, because by so doing it would be shortcutting the rules of civil and criminal procedure. The courts below correctly held that Congress intended the administrative and compromise processes to exist side by side, the former to be used when compromises either are not possible or are not considered in the interest of the United States, the latter to be used when they are.[14]

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[14]The law, of course, favors the resolution of disputes without litigation. Accordingly, courts have denied standing to those who are not parties to compromise agreements who nevertheless wish to challenge the validity of the agreements. See, *e.g.*, *In re Equity Funding Corp. of America Securities Litigation*, 603 F. 2d 1353, 1360-1361 (9th Cir. 1979); *Smith* v. *South Side Loan Co.*, 567 F. 2d 306, 307 (5th Cir. 1978). The agreements here compromised differences between the

2. Petitioner next argues that the court below erred in holding that the Secretary's compromise of anti-dumping duty claims under 19 U.S.C. 1617 is not subject to judicial review (Pet. 12). This contention is also without merit. Section 1617 is entirely devoid of standards to govern the discretionary exercise of the compromise authority conferred upon the Secretary by the statute. Here, as in *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 455-456 (1979), "on the face of the statute there is simply 'no law to apply' in determining if the decision [of the Secretary] is correct." Moreover, the legislative history of 19 U.S.C. 1617 is completely silent on the question of what standards the Secretary is to utilize in exercising the authority the statute confers upon him. Given this absence of substantive standards in either the statute itself or its legislative history, the court below correctly held, in accordance with a number of analogous decisions, that an exercise of the compromise authority contained in Section 1617 is not subject to judicial review. See, *e.g.*, *District of Columbia* v. *Schramm*, 631 F. 2d 854, 860-861 (D.C. Cir. 1980); *Greater New York Hospital Association* v. *Mathews*, 536 F. 2d 494, 497-498 (2d Cir. 1976).

Petitioner does not contend that 19 U.S.C. 1617 or its legislative history contains standards to govern the Secretary's discretionary settlement authority. Rather, petitioner contends (Pet. 13) that the court below erred because judicial review may be permissible, even in those cases where

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government and various importers and thus obviated the need to resolve those differences through litigation. Petitioner and the amici are strangers to these agreements and do not possess an interest in the duties assessed upon the importers. *Louisiana* v. *McAdoo*, 234 U.S. 627 (1914). Thus, petitioner's standing to attack the settlements at issue in this case is far from certain.

there are no applicable statutory standards, if the agency has abdicated its responsibilities or has acted beyond the bounds of or in clear defiance of its authority.

Even assuming, *arguendo*, that petitioner has correctly stated the law, the court below properly concluded that the Secretary's exercise of discretion in this case is not subject to judicial review. Petitioner has not shown that the Secretary failed to comply with the procedures specified in Section 1617.[15] Instead, petitioner contends (Pet. 13) that "the Secretary of Commerce and his advisors have been in clear defiance of the congressional will and have rested on 'considerations that Congress could not have intended to make relevant.' " The CCPA, however, thoroughly examined petitioner's allegations of "bad faith" and "defiance of the congressional will," including those advanced in this Court, and found that they were "no more than perfunctory" (Pet. App. 19a) and "conclusory" (*id.* at 19a-20a n.17).[16] The court therefore correctly held that judicial review was foreclosed. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971) (plaintiffs must make a "strong showing of bad faith or improper behavior" before being

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[15]The record is clear that the compromises were effected upon the recommendation of the Secretary's General Counsel (19 U.S.C. 1617; Exec. Order No. 12188, 45 Fed. Reg. 989 (1980); Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979)).

[16]The example of "bad faith" presented by petitioner (Pet. 15-16) is wholly irrelevant to this case. The quoted memorandum was drafted by Special Assistant to the General Counsel Jordan Luke of the Treasury Department in connection with unsuccessful settlement negotiations conducted in 1978. The memorandum did not express an official position (see Luke Deposition, pp. 446-447, Ex. G, U.S. Opposition to Rehearing in CCPA) and was not considered by the Commerce Department when it concluded the 1980 settlements at issue in this case (see Moyer Deposition, pp. 244-245, 651-653, 659; Hume Deposition, pp. 483-489, 607-608, 611; Barden Deposition, pp. 272-274, 274-278, Exhs. D, E and F, U.S. Opposition to Rehearing in CCPA).

permitted to seek explanations for agency action beyond those contained in formal administrative findings). Further review of this factual determination made by the Court of Customs and Patent Appeals is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ZENITH RADIO CORPORATION,

Petitioner,

vs.

THE UNITED STATES and
MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

On Petition for Writ of Certiorari to The
United States Court of Customs and Patent Appeals

BRIEF OF RESPONDENT MONTGOMERY WARD & CO., INCORPORATED IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTIONS RESTATED

1. Should the petition be granted to review the Court of Customs and Patent Appeals' determination that the general compromise authority in 19 U.S.C. § 1617 empowered United States government officials to settle claims relating to duties allegedly owed under the antidumping laws?

2. Should the petition be granted to review the Court of Customs and Patent Appeals' determination, based upon the record before it and the Court of International Trade, that "perfunctory" and "conclusory" allegations and evidence of "bad faith" do not justify judicial review of otherwise unreviewable discretionary government action?

TABLE OF CONTENTS

	PAGE
QUESTIONS RESTATED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
I. 19 U.S.C. § 1617 Clearly Authorized The United States to Settle Its Claims Under the Antidumping Laws	6
II. The Court of Customs and Patent Appeals Correctly Applied Established Principles of Administrative Law in Holding, Upon Its Review of the Record, That "Perfunctory" and "Conclusory" Allegations and Evidence of "Bad Faith" Do Not Justify Judicial Review of Otherwise Unreviewable Discretionary Government Action	7
III. The Court of Customs and Patent Appeals' Decision Is Not in Conflict with the Decision of the Court of Appeals for the District of Columbia Circuit	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

Bullard v. *Webster*, 623 F.2d 1042 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981)	9
CF&I Steel Corp. v. *Economic Development Administration*, 624 F.2d 136 (10th Cir. 1980)	8
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971)	8
City of Des Plaines v. *Metropolitan Sanitary District of Chicago*, 552 F.2d 736 (7th Cir. 1977)	8

	PAGE
Committee to Preserve American Color Television (a.k.a. COMPACT) v. *United States*, 527 F.Supp. 341 (Ct. Int'l Trade 1981)	3, 7
District of Columbia v. *Schramm*, 631 F.2d 854 (D.C. Cir. 1980)	9
Garcia v. *Neagle*, 660 F.2d 983 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1023 (1982)	9
Greater New York Hospital Association v. *Mathews*, 536 F.2d 494 (2nd Cir. 1976)	9
Hercules, Inc. v. *Environmental Protection Agency*, 598 F.2d 91 (D.C. Cir. 1978)	8
Jaymar-Ruby, Inc. v. *Federal Trade Commission*, 651 F.2d 506 (7th Cir. 1981)	9
Kent Corporation v. *NLRB*, 530 F.2d 612 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976)	8
Local 1219, American Federation of Government Employees v. *Donovan*, No. 81-2284 (D.C. Cir. July 13, 1982)	9
Merrill Ditch-Liners, Inc. v. *Pablo*, 670 F.2d 139 (9th Cir. 1982)	9
National Nutritional Foods Ass'n v. *Mathews*, 557 F.2d 325 (2nd Cir. 1977)	8
Zenith Radio Corp. v. *United States*, 509 F.Supp. 1282 (Ct. Int'l Trade 1981)	8

Statutes And Rules

19 U.S.C. §§ 160-173	2
19 U.S.C. § 1617	*passim.*
19 U.S.C. §§ 1673-1673i, 1677-1677b	2
Trade Agreements Act of 1979	2, 3, 7
Supreme Court Rule 28.1	1

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BRIEF OF RESPONDENT MONTGOMERY WARD & CO., INCORPORATED IN OPPOSITION TO THE PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Petitioner, Zenith Radio Corporation ("Zenith"), seeks review of a decision of the United States Court of Customs and Patent Appeals which held that the Court of International Trade lacked jurisdiction over Zenith's action challenging the United States' settlement of certain claims under the antidumping laws.[1] A brief restatement of the proceed-

[1] Pursuant to Supreme Court Rule 28.1, respondent Montgomery Ward & Co., Incorporated ("Montgomery Ward") states that its

(Footnote continued on following page)

ings below is necessary to correct certain misimpressions conveyed by the petition.[2]

Proceedings in the Court of International Trade

On June 27, 1980, Zenith filed its action seeking to set aside the settlements reached by the United States Department of Commerce ("Commerce Department") and the United States Department of Justice ("Justice Department") in compromise of the United States' claims under the antidumping laws with respect to the importation of certain television sets from Japan.[3] Zenith's complaint pleaded two causes of action. First, Zenith contended that no statutory or other authority allowed the settlement of the United States' claims under the antidumping laws and, therefore, that the settlements were *ultra vires*. On February 27, 1981, the Court of International Trade rejected this contention, finding ample statutory authority for the settlement in 19 U.S.C. § 1617. Appendix at 99a-109a. That decision explicitly considered and rejected Zenith's claim that

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(Footnote continued from preceding page)

parent company is Mobil Corporation and that Montgomery Ward has no subsidiaries (excluding wholly-owned subsidiaries) or affiliates.

Montgomery Ward was the appellant in the court below, seeking to protect the confidentiality of its sensitive, proprietary business information. Because Zenith's petition seeks relief from this Court which bears upon the possible future discoverability of this information, Montgomery Ward submits this brief in opposition to the petition.

[2] The Court of Customs and Patent Appeals' opinion accurately summarizes the relevant facts. *See* Appendix at 1a-7a.

[3] The antidumping laws, originally the Antidumping Act of 1921, were codified at 19 U.S.C. §§ 160-173. Effective January 1, 1980, the Antidumping Act was replaced when the essential provisions of that law were incorporated in the Tariff Act of 1930, as amended, by the Trade Agreements Act of 1979. Those provisions are presently codified as 19 U.S.C. §§ 1673-1673i, 1677-1677b.

the settlement authority in 19 U.S.C. § 1617 was inconsistent with the legislative amendments to this nation's trade laws embodied in the Trade Agreements Act of 1979. *Id.* at 105a-109a.[4]

Second, Zenith alleged that the United States' claims under the antidumping laws had been settled by the Commerce Department and the Justice Department arbitrarily, in bad faith and unlawfully. After Zenith filed a wide-ranging discovery request premised on this second cause of action, the United States moved for a protective order before the Court of International Trade. On December 12, 1980, that court, without any explanation of the bases for its conclusion, held that Zenith had "made a sufficiently strong showing of bad faith so as to warrant discovery" and ordered the United States to comply with Zenith's request. *See* Appendix at 97a-98a.

Among the documents sought by Zenith's discovery request was an investigative file compiled by the United States Customs Service ("Customs Service") with respect to respondent Montgomery Ward. That investigative file contained Montgomery Ward's sensitive, proprietary business information which had been produced to the Customs Service under strict assurances of confidentiality. Accordingly, Montgomery Ward intervened in the Court of International Trade to protect its interests in the continued confidentiality of its proprietary business documents.

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[4] The Court of International Trade reached the identical conclusion in *Committee to Preserve American Color Television (a.k.a. COMPACT)* v. *United States*, 527 F.Supp. 341 (Ct. Int'l Trade 1981). That case involves a challenge by the Committee to Preserve American Color Television and the Imports Committee, Tube Division, Electronic Industries Association (hereinafter referred to jointly as "COMPACT"), two of the *amici curiae* to Zenith's petition, to the April 28, 1980 settlements upon essentially the same grounds as were alleged by Zenith.

Upon its intervention in the Court of International Trade, Montgomery Ward, as well as the United States, opposed production of the Montgomery Ward file on the ground, *inter alia*, that Zenith had made no allegations or showing of "bad faith" sufficient to entitle Zenith to *any* discovery. On May 13, 1981, without explanation of its reasons and without opinion, the Court of International Trade overruled the United States' and Montgomery Ward's arguments and granted Zenith's motion to compel. Montgomery Ward's motion for reconsideration was denied, again without opinion or explanation of reasoning, on June 18, 1981.

Proceedings in the Court of Customs and Patent Appeals

To protect its substantial interests, Montgomery Ward appealed from the two orders of the Court of International Trade on the ground, *inter alia*, that those orders were clearly erroneous because Zenith had *never* made a sufficient showing of bad faith to warrant discovery outside the administrative record. The United States intervened in support of this appeal and similarly argued, *inter alia*, that the Court of International Trade had erred in allowing any discovery. Montgomery Ward and the United States designated as the record on appeal essentially the *entirety* of the record before the Court of International Trade so that the Court of Customs and Patent Appeals could independently consider the evidence and allegations which had been before the Court of International Trade both when that court, without explanation, made its finding of "a substantial preliminary showing of bad faith" and when that court ordered the production of Montgomery Ward's documents.

Notwithstanding these thoroughly briefed arguments raised on appeal, Zenith as appellee elected essentially to

ignore them. Instead, Zenith argued, virtually without discussion of its failure to provide any sufficient allegation or evidence of "bad faith," that the appeal should be dismissed because the orders of the Court of International Trade were interlocutory and not appealable.[5]

On March 11, 1982, the Court of Customs and Patent Appeals issued its decision, concurred in by all five judges of that court, concluding that the Court of International Trade was without jurisdiction to review Zenith's challenge to the United States' decision to settle its claims under the antidumping laws. Essentially, the Court of Customs and Patent Appeals reached two conclusions: first, that 19 U.S.C. § 1617 authorized the United States' settlement of its antidumping claims and, second, upon its independent review of the record which had been before the Court of International Trade, that Zenith's "conclusory" and "perfunctory" allegations and evidence of supposed "bad faith" on the part of United States officials did not justify judicial review by the Court of International Trade of otherwise unreviewable discretionary government action.

Subsequent to the March 11, 1982 decision below, Zenith filed a copious petition for rehearing in which it set forth, at length, the bases for its contention that 19 U.S.C. § 1617 did not provide authority for the settlements entered into by the United States. Zenith further argued, as it does here, that the March 11, 1982 decision was made without oral argument and without full consideration of the issues, and Zenith supplied the court below with the same additional, supposed indicia of "bad faith" as it presents in

[5] The Court of Customs and Patent Appeals held that the orders of the Court of International Trade were appealable. *See* Appendix at 8a-9a. Zenith has not sought review of this determination in its petition for a writ of certiorari.

this petition.[6] On May 13, 1982, Zenith's petition for rehearing was denied.

REASONS FOR DENYING THE PETITION

The questions presented in the petition are not appropriate for review by this Court. The Court of Customs and Patent Appeals' holding that the United States had authority to compromise its claims under the antidumping laws pursuant to 19 U.S.C. § 1617 is wholly consistent with well-settled principles of statutory construction and with the lower court decisions considering the same issue. In addition, the Court of Customs and Patent Appeals' conclusion, based on its review of the factual record which had been before the Court of International Trade, that "conclusory" and "perfunctory" allegations and evidence of "bad faith" do not justify judicial review of otherwise unreviewable discretionary agency action, is a straightforward application of well-established principles of administrative law and does not conflict with the decision of any other court of appeals or with any applicable decision of this Court.

I. 19 U.S.C. § 1617 Clearly Authorized The United States To Settle Its Claims Under The Antidumping Laws

Contrary to petitioner's arguments, the Court of Customs and Patent Appeals' determination that 19 U.S.C. § 1617 provided the statutory authority for the United States' compromise and settlement of its claims under the antidumping laws involves no more than a basic question of

[6] COMPACT, *amici curiae* in this Court, raised the same arguments in a lengthy memorandum which it filed in the court below in support of Zenith's petition for rehearing.

statutory construction. In light of the clear language of 19 U.S.C. § 1617 and the absence of any legislative history with respect to the Trade Agreements Act of 1979 which limits the broad settlement authority conferred by 19 U.S.C. § 1617, the Court of Customs and Patent Appeals reached the entirely correct conclusion that 19 U.S.C. § 1617 conferred the requisite authority. This conclusion is wholly consistent with two prior decisions of the Court of International Trade rejecting the precise claims raised here. *See Zenith Radio Corp.* v. *United States*, 509 F.Supp. 1282 (Ct. Int'l Trade 1981) (Appendix at 99a-109a); *Committee to Preserve American Color Television (a.k.a. COMPACT)* v. *United States*, 527 F.Supp. 341, 349-50 (Ct. Int'l Trade 1981). In short, petitioner's statutory authority claim does not present a substantial question which should be reviewed by this Court.

II. The Court Of Customs And Patent Appeals Correctly Applied Established Principles Of Administrative Law In Holding, Upon Its Review Of The Record, That "Perfunctory" And "Conclusory" Allegations And Evidence Of "Bad Faith" Do Not Justify Judicial Review Of Otherwise Unreviewable Discretionary Government Action

The Court of Customs and Patent Appeals' determination that Zenith's allegations did not justify judicial review of otherwise unreviewable discretionary action is a correct application of established principles of administrative law to the facts of Zenith's case. This Court has long recognized that discovery for the purpose of challenging administrative action alleged to have been taken in "bad faith" requires a preliminary "strong showing of bad faith or

improper behavior." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971). The courts of appeals, unlike the Court of International Trade in this case, have taken seriously this requirement of a strong preliminary showing of bad faith. *E.g., CF&I Steel Corp.* v. *Economic Development Administration*, 624 F.2d 136, 141 (10th Cir. 1980); *Hercules, Inc.* v. *Environmental Protection Agency*, 598 F.2d 91, 123 (D.C. Cir. 1978); *National Nutritional Foods Ass'n* v. *Mathews*, 557 F.2d 325, 331-32 (2nd Cir. 1977); *City of Des Plaines* v. *Metropolitan Sanitary District of Chicago*, 552 F.2d 736, 739-40 (7th Cir. 1977); *Kent Corporation* v. *NLRB*, 530 F.2d 612, 621 n.21 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976). A mere "speculative possibility" that an administrative official acted for some improper reason is insufficient. *Hercules, Inc.* v. *Environmental Protection Agency, supra.*

In the appeal below Montgomery Ward and the United States designated essentially the entire record which had been before the Court of International Trade when that court reached its unexplained conclusion that Zenith had made "a sufficiently strong showing of bad faith so as to warrant discovery" and when that court ordered production of the Montgomery Ward file. On its independent review of that factual record, the Court of Customs and Patent Appeals determined that Zenith's allegations and evidence of impropriety were "no more than perfunctory." Appendix at 19a. The court below analyzed the pleadings, numerous memoranda, documentary exhibits, interrogatory answers, and various other materials filed in the Court of International Trade before reaching its determination that Zenith's claims of "bad faith" were wholly "conclusory." *Id.* at 19a-20a, n.17. No significant purpose would be served by this Court's further review of that factual determination.

III. The Court Of Customs And Patent Appeals' Decision Is Not In Conflict With The Decision Of The Court Of Appeals For The District Of Columbia Circuit

COMPACT's claim, as *amici curiae*, of a conflict between the decision below and the recent decision of the D.C. Circuit in *Local 1219, American Federation of Government Employees* v. *Donovan*, No. 81-2284 (D.C. Cir. July 13, 1982), is without substance. In *Local 1219*, the D.C. Circuit addressed the question of judicial review of agency action under a completely different statute and regulatory regimen. That court's decision, involving the Civil Service Reform Act, is in no way in conflict with the Court of Customs and Patent Appeals' determination involving the exercise of executive discretion under 19 U.S.C. § 1617 in settling antidumping claims. Numerous courts of appeals interpreting statutes similar to 19 U.S.C. § 1617, which do not provide substantive standards for administrative action and which contemplate discretionary action wholly inappropriate for judicial scrutiny, have held such discretionary agency action to be outside the scope of judicial review. *E.g., District of Columbia* v. *Schramm*, 631 F.2d 854, 860-61 (D.C. Cir. 1980); *Greater New York Hospital Association* v. *Mathews*, 536 F.2d 494, 497-98 (2nd Cir. 1976); *Garcia* v. *Neagle*, 660 F.2d 983, 988 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1023 (1982); *Bullard* v. *Webster*, 623 F.2d 1042, 1046-47 (5th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981); *Jaymar-Ruby, Inc.* v. *Federal Trade Commission*, 651 F.2d 506, 510-12 (7th Cir. 1981); *Merrill Ditch-Liners, Inc.* v. *Pablo*, 670 F.2d 139, 140-141 (9th Cir. 1982). The decision of the Court of Customs and Patent Appeals is entirely consistent with the above authority.

CONCLUSION

The Court of Customs and Patent Appeals correctly applied principles well-established by this Court and adhered to by the courts of appeals. The decision below does not conflict with the decision of any other court of appeals, and is based upon an independent factual review of the record before the Court of International Trade. The petition for certiorari should be denied.

Respectfully submitted,

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On Petition For Writ Of Certiorari To The United States Court Of Customs And Patent Appeals

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PETITIONER'S REPLY MEMORANDUM

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
1. *Petitioner's First Question Presented*	2
2. *Petitioner's Second Question Presented*	4
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	Page
Board of Education, Island Trees Union Free School District No. 26 v. *Pico*, ___ U.S. ___, 102 S.Ct. 2799 (1982)	7
Dombrowski v. *Eastland*, 387 U.S. 82 (1967)	7
Kennedy v. *Silas Mason Co.*, 334 U.S. 249 (1948)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-166

ZENITH RADIO CORPORATION, *Petitioner*,

v.

THE UNITED STATES and MONTGOMERY WARD & CO., INCORPORATED, *Respondents*.

On Petition For Writ Of Certiorari To The United States Court Of Customs And Patent Appeals[1]

PETITIONER'S REPLY MEMORANDUM[2]

INTRODUCTION

The Government would have this Court forget that it (a) acknowledged, throughout proceedings in the trial court, the existence of that court's jurisdiction and of petitioner's standing, (b) did not appeal from the trial court's preliminary injunction of December 1980, and (c) ultimately subjected itself to many months of substantial and highly revealing discovery. Now, the Government as well as Montgomery Ward pretend that it is not unusual

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[1] Effective October 1, 1982, the United States Court of Customs and Patent Appeals has merged into the United States Court of Appeals for the Federal Circuit.

[2] Pursuant to Rule 28.1, petitioner, Zenith Radio Corporation, advises that it has no parent companies, subsidiaries (other than wholly owned subsidiaries) or affiliates.

or irregular for an appellate court, in a non-party discovery dispute, with no portion of the voluminous discovery record before it, to order *sua sponte* the dismissal for lack of subject matter jurisdiction of a cause which challenges governmental action as being without statutory authority and taken in bad faith. Fortunately for our system of justice, however, such judicial action is uncommon if not unprecedented.

1. Petitioner's First Question Presented

The respondent Montgomery Ward does not dispute the claims of petitioner and the *amici curiae* that the question of statutory interpretation presented in this case is of great importance to American manufacturers and their workers. Rather, Montgomery Ward argues that the statutory question is not substantial because the conclusion reached by the Court of Customs and Patent Appeals (CCPA) "is wholly consistent with two prior decisions of the Court of International Trade rejecting the precise claims raised here." Montgomery Ward's brief at 7.

The argument is wholly invalid. Judge Maletz, who issued the two cited Court of International Trade decisions, found no repugnancy between the specific 1979 enactment (giving domestic interests the right to participate in and seek judicial review of antidumping duty determinations) and the old, general compromise authority contained in section 617 of the Tariff Act of 1930 because—

> Any person adversely affected by the decision to settle may then seek judicial review of the Secretary's action. Considering that judicial review is thus available and that settlement may expedite the collection of antidumping duties, these procedures

> do not frustrate the Congressional purpose underlying section 751.

Pet. App. 108a. Of course, once the CCPA concluded that judicial review of the Secretary's action is *not* available, the underpinnings of Judge Maletz's decision collapsed and, indeed, Judge Maletz himself remarked that our petition was raising important questions of statutory law for review by this Court. Pet. App. 111a.

Neither does the Government dispute the importance of the statutory issue to domestic industry and labor. However, in trying to validate the Court of International Trade's decision, which the Government suggests the CCPA implicitly endorsed, the Government has had to resort to the unfortunate tactic of quoting at length, but selectively, from the trial court's opinion. Government's brief at 9-10, 15. *Omitted from the Government's quotations are the two sentences quoted above by petitioner which formed the core of the court's reasoning.* Clearly, the trial court recognized that Congress, in 1979, was extremely concerned over domestic interests' having been excluded from the antidumping decisionmaking process and consequently took specific steps to assure domestic interests' right to be involved in that process.

The Government's suggestion that Congress intended the Executive Branch to have the authority to enter into unreviewable compromises of antidumping cases without the participation of domestic interests at the same time that it intended such interests to have the unquestionable right to participate in the decisionmaking and review process cannot withstand scrutiny. The issue presented is simply too critical to domestic industry and labor to turn on such frivolousness. Review by this Court and indeed summary reversal have been shown to be warranted.

2. Petitioner's Second Question Presented

With respect to the "bad faith" issue, the respondents would have this Court believe that the CCPA has made essentially a factual determination which, as such, does not merit this Court's attention. However, the question presented for review is legal in nature and vitally important to administrative law.

The CCPA never disputed the evidence of bad faith on the part of officials of the Treasury Department and the Office of the Special Trade Representative. Rather, the court believed that such bad faith was irrelevant, that the decision to settle was the personal decision of the Secretary of Commerce, and that any legal wrong to petitioner must be based on the Secretary's violations of the procedures set forth in the settlement statute. Pet. App. 16a, 19a.

Thus, the CCPA was unconcerned about (or unaware of) the following facts:

(a) In May 1977, the Special Trade Representative made a commitment to Japanese Government officials which they interpreted to mean that the United States would not assess any more (mandatory) antidumping duties on imported Japanese television sets.

(b) In early 1978, scores if not hundreds of United States Customs officials were preparing—with the approval of the Commissioner of Customs and Treasury Department officials—to assess almost $400 million of antidumping duties on imported Japanese television sets, on March 31, 1978. On March 30, 1978, following a meeting between Treasury Department and Japanese Government officials, Customs Headquarters issued instructions to the various Customs field offices to assess only $46 million in antidumping duties.

(c) Following the events of March 1978, there were numerous occasions on which U.S. Government officials strained to assist and accommodate the Japanese interests in an effort to prevent the enforcement of our law. Some of these are described in the brief of *amici curiae*, The Committee To Preserve American Color Television, *et al.*, at 12-13. Among other things, an attorney reporting to the General Counsel of the Treasury Department was designated the chairman of a special television task force, in which capacity he exerted pressure on Customs auditors and attorneys to take positions on factual and legal issues contrary to their beliefs and hospitable to the Japanese interests.

(d) In late 1979, a Deputy Special Trade Representative consulted with Japanese television manufacturers' representatives in an effort to accommodate their interests in the television antidumping proceeding.

(e) In January 1980, the responsibility for administering the antidumping laws was transferred from the Secretary of the Treasury to the Secretary of Commerce—in large part because of Congress' dissatisfaction with Treasury's mishandling of the television case. The former special television task force chairman became an Assistant General Counsel at the Office of the United States Trade Representative (USTR), where he proceeded to work on the television case and to orchestrate the settlement that was to occur. As part of this orchestration, he (i) prepared a memorandum for the Commissioner of Customs' signature, (ii) prepared a memorandum for the Secretary of Commerce to the USTR, requesting the latter's "assistance" in developing a plan for "moving forward" on the television antidumping case, (iii) met with Japanese Government officials in Japan on two occasions in March 1980—once by himself and a second time,

accompanied by the Commerce Department's General Counsel, and (iv) furnished that General Counsel with his quantification of the allegedly (and grossly understated) maximum antidumping duty liability on Japanese television sets which he developed at Treasury and the USTR's office. Indeed, this USTR official submitted the notes described in our petition at 14-16 to the Commerce Department's General Counsel. The USTR official advised the General Counsel that the notes—taken during an earlier negotiating session with Japanese officials and discussing how to circumvent our antidumping law—are "still applicable" and that "I intend to use these documents as the basic documents for your trip to Japan."[3]

We submit that there is something disastrously wrong with a rule of law which forecloses judicial review of the settlement agreements on some theory that the decision to settle was the personal decision of the Secretary of Commerce. Petitioner's allegations of bad faith are substantial and—contrary to the suggestions of respondents—were not refuted by the court below. Without even considering the motives of the Secretary, the information submitted to him was severely tainted. Under the circumstances, judicial review cannot be limited to determining simply whether a customs officer's report and a General Counsel's recommendation were delivered to the Secretary. Such a circumscribed review would make a mockery of the judicial process.

In finding that petitioner failed to plead a proper cause of action and in preventing petitioner from bringing its case to trial, the CCPA improperly shielded alleged gov-

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[3] The Government's statement that these notes are irrelevant to the 1980 settlement (Opposition at 17 n.16) is incorrect. Also, *see* Petition at 14 n.17.

ernmental misconduct from judicial scrutiny. Should this case not be disposed of on the basis of the statutory authority question, it should be remanded to the trial court so that a full record may be developed with respect to the material facts in issue.[4] *See Dombrowksi* v. *Eastland*, 387 U.S. 82, 84 (1967) ("In the absence of the factual refinement which can occur only as a result of trial, we need not and, indeed, could not express judgment as to the legal consequences of such collaboration, if it occurred."). *See also Board of Education, Island Trees Union Free School District No. 26* v. *Pico*, ___ U.S. ___, 102 S.Ct. 2799 (1982); *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 257 (1948).

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] We consider the alleged "factual" history set forth in the Government's opposition to be woefully inaccurate and incomplete.

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Respondents

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

BRIEF FOR BETHLEHEM STEEL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF BETHLEHEM STEEL CORPORATION	2
REASONS FOR GRANTING THE WRIT OF CERTIORARI	7
The Decision of the Court of Customs and Patent Appeals Nullifies the Statutory Right of Domestic Labor and Industry to Participate in Antidumping and Countervailing Duty Proceedings and the Right to Judicial Review	7
CONCLUSION	9

TABLE OF AUTHORITIES

Statutes: Page

19 U. S. C. §§ 160-173 7
19 U. S. C. § 1303 7
19 U. S. C. § 1516a 8
19 U. S. C. § 1675(a) 8
19 U. S. C. § 1675(d) 8
Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1109, 93 Stat. 144, 314 (1979) 8

Legislative:

Hearings on the Implementation of the Multilateral Trade Negotiations before the Subcomm. on International Trade of the Senate Comm. on Finance, 96th Cong., 1st Sess. at 210 (1979) 7
Hearings on Legislation Necessary to Implement the Multilateral Trade Agreement Concluded in Geneva, Switzerland before the Subcomm. on Trade of the House Comm. on Ways and Means, 96th Cong., 1st Sess. generally, and esp. 630-32, 648 (1979) 7
Reorganization Plan No. 3 of 1979: Hearings before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. 174-175, 186 (1979) 8
Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979) 8
S. Rep. No. 96-249, 96th Cong., 1st Sess. 80-81 (1979) 8
S. Rep. No. 96-402, 96th Cong., 1st Sess. 12, 23-24 (1979) .. 8
H. R. Rep. No. 96-317, 96th Cong., 1st Sess. 72 (1979) 8
H. R. Rep. No. 96-585, 96th Cong., 1st Sess. 6-7 (1979) 8

Administrative:

Exec. Order 12188, 45 Fed. Reg. 989 (1980) 8

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR BETHLEHEM STEEL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Bethlehem Steel Corporation ("Bethlehem") respectfully urges the Court to grant the Petition for a Writ of Certiorari to review the erroneous judgment of the United States Court of Customs and Patent Appeals, entered without a proper record before it and without the benefit of briefing or oral argument, which summarily directs the United States Court of International Trade to dismiss this suit for lack of jurisdiction. The correct resolution of the questions presented is profoundly important to Bethlehem and to the domestic steel industry in the United States, as well as to the television manufacturing industry, most immediately affected by this ruling.

INTEREST OF BETHLEHEM STEEL CORPORATION [1]

Bethlehem manufactures, fabricates, and sells steel and steel products. It is the second largest producer of steel in the United States, and distributes steel products principally through its own sales organization, which has sales offices, mill depots, or supply stores in numerous locations in the United States. Its primary markets include the construction, transportation, service center, and processor markets. In this business, Bethlehem competes for sales within the United States against domestic importers of foreign steel and against foreign steel-producing interests, many of which are heavily subsidized, or owned, by foreign governments. A large proportion of the foreign steel which the United States imports is imported at dumping prices, *i.e.*, at import prices that are far below the prices at which the products are sold in the foreign countries where they are produced.

Steel products produced by subsidized foreign mills and imported at dumping prices are threatening to destroy the United States steel industry. In 1979, imports accounted for 15.2% of apparent domestic steel consumption. In 1981 imports surged to a share of about 19%, during the fourth quarter of 1981 capturing approximately 24% of domestic consumption. This trend continues. In the first quarter of this year, imports of foreign steel increased by 34.7% over the levels of the same period last year, and imports continue to account for more than 20% of apparent domestic consumption.

Simultaneously, and partially as a consequence of the sharp increase in foreign steel's share of domestic consumption, the United States steel industry is currently operating at approximately 42% of production capacity—the lowest level since 1938. Employment in the industry is at the lowest point since 1933. About one third of the

1. Pursuant to Rule 36 of the rules of this Court, written consent to file this brief amicus curiae has been obtained from the Solicitor General and from Zenith Radio Corporation and Montgomery Ward & Co., Inc.

nation's steelworkers, more than 100,000 people, are on layoff, and another 29,000 are working reduced schedules. These figures do not reflect the substantial adverse effects of the decline of the steel business on the domestic coal industry and on other related industries.

American steel producers have sustained serious losses. Bethlehem lost $113.8 million on sales of $3.35 billion during the first six months of 1982. Bethlehem's shipments during the second quarter were the lowest for any quarter in more than 20 years. Second-quarter losses have also been reported by Jones & Laughlin Steel Corporation, National Steel Corporation, Wheeling-Pittsburgh Steel Corporation, and Inland Steel Co. United States Steel Corporation, which is diversified, has reported sharply reduced earnings, and steel-related businesses were, according to the analysts, substantially unprofitable.

In January, 1982, Bethlehem and other steel producers filed countervailing duty and antidumping actions against steel producers from France, West Germany, Italy, Belgium, the Netherlands, the United Kingdom and Luxembourg, and preliminary or final countervailing and antidumping duty determinations have been made in many of these proceedings. Additional pending petitions involve steel products from Brazil, South Africa, Roumania, Spain and Korea.

On June 11, 1982, the United States Department of Commerce made preliminary determinations that the seven European countries and South Africa and Brazil had subsidized the producers of a number of major steel mill products that are imported by the United States, the subsidies in some instances amounting to as much as $240 per ton.

On August 10, 1982, the Department of Commerce acted on the antidumping petitions, finding that steel imported from Belgium, France, Italy, West Germany, the United Kingdom, and Romania had been imported at prices less than fair value. The dumping margins found by the Commerce Department substantiate import pricing

at levels as much as 40% below prices in the foreign markets.

The findings in the countervailing duty and antidumping proceedings should result in the imposition, under the United States customs laws, of duties on certain imported steel products and are an important step in the enforcement of United States trade laws. However, the issuance of countervailing or antidumping duty orders by the Commerce Department does not assure that the unfair trade practices of subsidization or dumping will be arrested or that the destructive effects will be neutralized. Rather, that result depends on the continuing, proper ascertainment and assessment of duties which equal and offset the margins of subsidization or dumping that are associated with these import transactions.

Bethlehem, the domestic steel industry, and many other American industries have been vitally concerned with Zenith's case. Because of the importance and far-reaching effect of the decision of the Court of Customs and Patent Appeals below, an application was made to that court on behalf of Bethlehem and six other companies for leave to file an *amicus curiae* brief in support of Zenith's petition for rehearing. The other companies were Armco, Inc., Carlisle Tire & Rubber Company, PPG Industries, Inc., SCM Corporation, Stewart-Warner Corporation, and The Timken Company, and represented, in addition to the steel industry, domestic industries producing tires and inner tubes, glass, portable electric typewriters, speedometers, and roller bearings.

On March 24, 1982—one day after the motion for leave was filed—the Court of Customs and Patent Appeals denied our application and refused to consider our views on the critical issues presented.

The decision of the Court of Customs and Patent Appeals has effectively emasculated the carefully designed statutory machinery which Congress established to assure that countervailing and antidumping duties are assessed

in the correct amounts and collected, and that the fundamental trade policies of the nation are faithfully executed. The core of that apparatus is participation by all interested parties in the administrative process and in judicial review. The opportunities to participate in the process and to seek judicial review were deliberately conferred by Congress on domestic industry, as a matter of right. The lower court's decision, if permitted to stand, destroys that right, jeopardizes the effectiveness of the Congress' program to combat unfair competition, and may deal a serious blow to important industries in this country which are waging an uphill competitive battle against foreign imports that are dumped and subsidized by foreign governments.

The future of the United States steel industry as a viable component of the domestic economy hinges in important part on the faithful execution of the laws Congress has enacted to protect independent firms in this country from powerful international economic forces that are capable of causing illegitimate distortion of trade patterns and permanent, irreparable damage to the industrial sector of American business.

This is an unusual case, and one of the highest importance. The record in this case contains evidence of the most shocking conduct on the part of government officials charged with the responsibility to enforce the antidumping laws. There is evidence here that the Executive Branch directed $2 billion dollars of imported merchandise, subject to a formal finding of dumping under the Antidumping Act of 1921, to be liquidated at declared values that were actually known by the government officials involved to be false. The effect of this action would have been to reduce the amount collected. There is evidence here of egregious actions on the part of government officials entrusted with very important responsibilities.

Bethlehem believes that the decision of the Court of Customs and Patent Appeals in this case, holding that the

courts are powerless to inquire into and to check blatant circumvention of federal law by government officials themselves, is dangerous and mistaken. The ruling jeopardizes Bethlehem's vital, continuing interest in the proper enforcement of the antidumping and countervailing duty laws. Because of its urgent concern for the serious implications of the decision, Bethlehem files this brief *amicus curiae* and earnestly requests this Court to grant Zenith's Petition for a Writ of Certiorari to review the decision.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Decision of the Court of Customs and Patent Appeals Nullifies the Statutory Right of Domestic Labor and Industry to Participate in Antidumping and Countervailing Duty Proceedings and the Right to Judicial Review.

During the 1970's many industries in the United States were severely injured by unfair import practices, such as dumping and export subsidization. Although statutory remedies such as the Antidumping Act of 1921 (previously codified as 19 U. S. C. §§ 160-173) and the countervailing duty law (19 U. S. C. § 1303) had been in place for many years, the Executive Branch was manifestly unable or unwilling to enforce these laws in an effective manner. Extraordinarily delayed and inadequate duty assessments frustrated the objective of the laws. Domestic industries and their workers, the intended beneficiaries of these laws, had no effective say in or review of the duty assessment decision process.[2]

In 1979, Congress adopted drastic and important corrective measures to effectuate the intent of the trade laws. Congress persuaded the Executive Branch to restructure and transfer the responsibility for enforcement of the antidumping laws within the Executive Branch. Under this scheme of reorganization, the Treasury Department—which previously had administered these laws and had compiled a dismal record of non-enforcement—was relieved of

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2. *See, e.g., Hearings on Legislation Necessary to Implement the Multilateral Trade Agreement Concluded in Geneva, Switzerland before the Subcomm. on Trade of the House Comm. on Ways and Means,* 96th Cong., 1st Sess. *generally,* and *esp.* 630-32, 648 (1979); *Hearings on the Implementation of the Multilateral Trade Negotiations before the Subcomm. on International Trade of the Senate Comm. on Finance,* 96th Cong., 1st Sess. at 210 (1979).

further authority and responsibility in this field.[3] Congress also enacted the Trade Agreements Act of 1979, which provided a new framework for administrative and judicial review of countervailing and antidumping duty determinations—a framework that assured domestic interested parties the right to participate in the administrative and judicial process in these important international trade matters. *See,* Sections 751(a), (d) and 516A of the Tariff Act of 1930, as added by the Trade Agreements Act, Sections 101 and 1001, 19 U. S. C. §§ 1675(a), (d) and 1516a.

Section 751, in addition to expediting "the administration of the assessment phase of antidumping and countervailing duty investigations" provides "a greater role for domestic interested parties" and introduces "more procedural safeguards." *S. Rep. No. 96-249,* 96th Cong., 1st Sess. 80-81 (1979); *H. R. Rep. No. 96-317,* 96th Cong., 1st Sess. 72 (1979).

Section 516A assures that the same domestic interested parties have access to the courts in order to challenge administrative determinations of antidumping or countervailing duties to be assessed. *See,* 19 U. S. C. § 1516a(a)(2)(B)(iii); *H. R. Rep. No. 96-317, supra,* at 179; *S. Rep. No. 96-249, supra,* at 245, 250.

Notwithstanding the sweeping reforms that Congress enacted, the court below has effectively ruled: (a) that the Commerce Department is not required to follow the mandatory procedures specified in section 751; (b) that mandatory duties need not be assessed; (c) that domestic

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3. *See,* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1109, 93 Stat. 144, 314 (1979); *H. R. Rep. No. 96-585,* 96th Cong., 1st Sess. 6-7 (1979); *S. Rep. No. 96-402,* 96th Cong., 1st Sess. 12, 23-24 (1979); *Reorganization Plan No. 3 of 1979: Hearings before a Subcomm. of the House Comm. on Government Operations,* 96th Cong., 1st Sess. 174-175, 186 (1979); *Reorganization Plan No. 3 of 1979,* 44 Fed. Reg. 69273 (1979); Exec. Order 12188, 45 Fed. Reg. 989 (1980).

interests need not be afforded an opportunity to participate in proceedings designed to resolve questions of antidumping or countervailing duty liability; and (d) that domestic interests need not be permitted to obtain judicial review of administrative determinations of such liability.

Thus, even if the pending steel dumping and subsidy cases result in antidumping and countervailing duty orders, under the lower court's ruling in this case, the Executive Branch could enter into "settlement" agreements with foreign or import interests. Officials of the Executive Branch could disregard the direction of Congress expressed in the 1979 Trade Agreements Act, without concern that representatives of the workers and the industries affected by these secret compromises could obtain judicial review of their conduct and judicial scrutiny of their fidelity to the letter and intent of the law.

In short, the ruling below threatens to perpetuate the same longstanding abuses in the administration of the trade laws that Congress intended once and for all to stop.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
1. The question of whether the procedural safeguards and the rights of judicial review established in the Trade Agreements Act of 1979 can be ignored by reliance on the general compromise authority contained in section 617 presents a substantial question respecting the enforcement of our international trade laws with important implications for the general body of administrative law.	7
2. There is a conflict between the U.S. Court of Customs and Patent Appeals and the U.S. Court of Appeals for the District of Columbia Circuit with respect to the reviewability under the Administrative Procedure Act of an exercise of settlement authority by federal officials.	9
3. Assuming *arguendo* that the execution of bilateral settlement agreements in antidumping proceedings is a matter committed by law to agency discretion, the pending petition raises the fundamental question of whether review of discretionary action is appropriate when allegations of bad faith are made.	10
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	PAGE
Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967)	8, 16
Bell v. *Hood*, 327 U.S. 678 (1946)	6
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971)	8, 9
Committee to Preserve American Color Television (a.k.a. COMPACT) v. *United States*, Court No. 81-3-00258 (Ct. Int'l Trade filed March 9, 1981)	2
Dunlop v. *Bachowski*, 421 U.S. 560 (1975)	16
Local 1219, American Federation of Government Employees v. *Donovan*, No. 81-2284 (D.C. Cir. July 13, 1982)	9, 10
Montgomery Ward & Co., Inc. v. *Zenith Radio Corp.*, 673 F.2d 1254 (CCPA 1982)	1, 6, 7, 9
Natural Resources Defense Council, Inc. v. *SEC*, 606 F.2d 1031 (D.C. Cir. 1979)	9

Statutes

Administrative Procedure Act	
Section 10 (5 U.S.C. § 701(a)(2) (1976))	7, 10
Section 10(e) (5 U.S.C. § 706(2)(A) (1976))	8
Antidumping Act, 1921, as amended (repealed 1979)	11
Section 201(a) (19 U.S.C. § 161(a) (1976))	3
Civil Service Reform Act of 1978	
Section 7120 (5 U.S.C. § 7120)	9
Customs Courts Act of 1980, Pub.L. No. 96-417, 94 Stat. 1727 (1980)	4
Tariff Act of 1922, 42 Stat. 858 (1922)	
Section 617	4
Tariff Act of 1930, as amended	
Section 516A (19 U.S.C. § 1516a (Supp. III 1979))	3
Section 516A(c)(2) (19 U.S.C. § 1516a(c)(2) (Supp. III 1979))	3
Section 617 (19 U.S.C. § 1617 (1976))	4, 5, 7, 8, 10, 14, 16, 17

PAGE

Section 731 (19 U.S.C. § 1673 (Supp. III 1979)) 3
Section 751(a) (19 U.S.C. § 1675(a) (Supp. III 1979)) 5
Section 751(a)(1) (19 U.S.C. § 1675(a)(1) (Supp. III 1979)) 3
Section 751(d) (19 U.S.C. § 1675(d) (Supp. III 1979)) 3
Section 777(c)(1) (19 U.S.C. § 1677f(c)(1) (Supp. III 1979)) 3
Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) 3, 5, 8
Section 101 3
Section 1001 3
Pub. L. No. 90-634, tit. 2, § 201, 82 Stat. 1347 (1968) 11
28 U.S.C. § 1581 (Supp. IV 1981) 4
28 U.S.C. § 1585 (Supp. IV 1981) 4
Sup. Ct. R. 17 6

Administrative

Exec. Order No. 12188, 45 Fed. Reg. 989 (1980) 3
Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979) 3
19 C.F.R. § 153.49 (1979) 13
19 C.F.R. § 353.55 (1981) 13
29 C.F.R. § 208.66 9

Legislative

H.R. Rep. No. 317, 96th Cong., 1st Sess. (1979) 3
H.R. Rep. No. 585, 96th Cong., 1st Sess. (1979) 4
S. Rep. No. 249, 96th Cong., 1st Sess. (1979) 3
S. Rep. No. 402, 96th Cong., 1st Sess. (1979) 4
S. Rep. No. 752, 79th Cong., 1st Sess. (1945) 8
Multilateral Trade Negotiations: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means (Serial 95-90), 95th Cong., 2d Sess. (1978) 11
Administration of the Antidumping Act of 1921: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means (Serial 95-114), 95th Cong., 2d Sess. (1978) 11

PAGE

Miscellaneous

K. Davis Administrative Law Treatise § 28.16 (Supp. 1982) 8

L. Jaffe, Judicial Control of Administrative Action (1965) 8

Berger, *Administrative Arbitrariness and Judicial Review*, 65 Colum. L. Rev. 55 (1965) 8

IN THE

Supreme Court of the United States

October Term, 1982

No. 82-166

ZENITH RADIO CORPORATION,

Petitioner,

v.

THE UNITED STATES and
MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

BRIEF OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

The Committee to Preserve American Color Television and the Imports Committee, Tube Division, Electronic Industries Association, hereby respectfully request as *amici curiae*[1] that the United States Supreme Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Customs and Patent Appeals ("CCPA") in *Montgomery Ward & Co., Inc. v. Zenith Radio Corp.*, 673 F.2d 1254 (CCPA 1982).

INTEREST OF THE COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION

The Committee to Preserve American Color Television (a.k.a. COMPACT) is an unincorporated association comprised of 11 labor organizations and four corporations engaged in the manufacture of finished television receivers and their various parts and

1. All of the parties have consented to the filing of this *amicus* brief. Letters containing counsels' written consent are on file with the Clerk of this Court.

components.[2] Since its organization in 1976, COMPACT has represented the interests of the domestic television industry and its workers in various administrative and judicial proceedings under the U.S. international trade laws. COMPACT has actively participated in various phases of the administration and enforcement of T.D. 71-76, the Secretary of the Treasury's formal dumping finding respecting television receivers from Japan, the subject of this case. The Imports Committee, Tube Division, Electronic Industries Association ("Imports Committee") is an association of manufacturers of color television picture tubes and glass for such picture tubes. The Imports Committee filed the original dumping petition which led to promulgation of T.D. 71-76 in 1971.

COMPACT and the Imports Committee have filed suit in the U.S. Court of International Trade[3] challenging the lawfulness of the same settlement agreements which are the subject of the present litigation. The decision of the CCPA for which certiorari is sought could, if allowed to stand, prevent COMPACT and the Imports Committee from litigating many of the important issues surrounding the government's conduct in the television dumping matter.

STATEMENT OF THE CASE

This case tests the accountability of government officials for failing to assess and collect antidumping duties on imported merchandise subject to a formal dumping finding.

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2. The participants in COMPACT include the Industrial Union Department, AFL-CIO; the Allied Industrial Workers of America, International Union; the American Flint Glass Workers Union of North America; the Communications Workers of America; the Glass Bottle Blowers' Association of the U.S. and Canada; the Independent Radionic Workers of America; the International Association of Machinists; the International Union of Electrical, Radio and Machine Workers; the International Brotherhood of Electrical Workers; the United Furniture Workers of America; the United Steelworkers of America; Corning Glass Works; Owens-Illinois, Inc.; Sprague Electric Company; and Wells-Gardner Electronics Corp.

3. *Committee to Preserve American Color Television (a.k.a. COMPACT)* v. *United States*, Court No. 81-3-00258 (Ct. Int'l Trade filed March 9, 1981).

The 96th Congress was responsible for undertaking three major reforms in the field of international trade law, each of which was directly related to Executive Department accountability for proper enforcement of the law. First, Congress passed the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979), which included a major overhaul of the administrative procedures applicable to antidumping proceedings and a major expansion of the rights of domestic interests to judicial review following administrative action. The reforms embodied in the 1979 law which relate to the assessment and collection of antidumping duties[4] —including the right to a hearing and the absolute right to judicial review—were designed to provide a "greater role for domestic interested parties" and greater "procedural safeguards." S.Rep. No. 249, 96th Cong., 1st Sess. 81 (1979). *See also* H.R. Rep. No. 317, 96th Cong., 1st Sess. 72 (1979). Second, Congress ratified Reorganization Plan No. 3 of 1979, which transferred the administration of antidumping proceedings from the Secretary of the Treasury to the Secretary of Commerce. 44 Fed. Reg. 69273 (1979); Exec. Order No. 12188, 45 Fed. Reg. 989 (1980). Both the Senate and the House were critical of the Treasury Department's administration of the

4. The Trade Agreements Act of 1979, section 101 of which added a new Title VII to the Tariff Act of 1930 ("the Act"), 93 Stat. 144, 150 (1979), created or continued the existence of a number of legally protected rights for members of the injured domestic industry and its workers. First, section 731 of the Act continued the clear cut and unequivocal mandate of the prior law that once a finding of dumping is made, "there *shall* be imposed upon such merchandise an antidumping duty...." 19 U.S.C. § 1673 (Supp. III 1979) (emphasis added). *Cf. id.* 161(a) (1976) (repealed). Second, strict time limitations were imposed on the administering authority, mandating that at least once every 12 months "the administering authority . . . *shall* . . . review and determine . . . the amount of any antidumping duty." *Id.* § 1675(a)(1) (Supp. III 1979) (emphasis added). Third, interested parties were given the right to a hearing during this annual administrative determination of antidumping duties, *id.* § 1675(d), together with access to confidential information subject to a protective order, *id.* § 1677f(c)(1), in order to ensure meaningful participation in the administrative process. Finally, section 1001 of the Trade Agreements Act of 1979, 93 Stat. at 300, gave interested parties expanded rights of judicial review to challenge determinations with respect to the assessment of antidumping duties, 19 U.S.C. § 1516a (Supp. III 1979), together with the right, under appropriate circumstances, to obtain injunctive relief preventing the liquidation of entries prior to the conclusion of judicial review of the assessment determination. *Id.* § 1516a(c)(2).

antidumping law. S.Rep. No. 402, 96th Cong., 1st Sess. 12 (1979); H.R.Rep. No. 585, 96th Cong., 1st Sess. 6 (1979). The repeated failure of the Treasury Department to implement the statutory remedy for dumping—the assessment and collection of a special antidumping duty—was clearly a paramount concern of the Congress. Third, Congress passed the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980), the principal purpose of which was to create a new court, the United States Court of International Trade, with vastly expanded powers to provide comprehensive relief to aggrieved parties in disputes involving international trade matters. Congress vested the new court with exclusive jurisdiction over international trade matters, 28 U.S.C. § 1581 (Supp. IV 1981), full equity powers, and all of the prerogatives of district courts of the United States, *id.* § 1585.

On April 28, 1980, the Secretary of Commerce, following secret negotiations with the Government of Japan, Japanese television manufacturers and various importing interests, ignored the procedures of the 1979 legislation related to the assessment of antidumping duties and concluded bilateral settlement agreements with 22 importers covering the great bulk of imported television receivers subject to T.D. 71-76. The views of the domestic television industry were not solicited prior to the execution of these agreements despite its obvious and well-documented interest in the enforcement of T.D. 71-76. The Secretary of Commerce relied upon section 617 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1617 (1976) (hereinafter "section 617"), as the authority for entering into these bilateral settlement agreements. Section 617, which had its conceptual origin during the Civil War, was first enacted in its modern form as part of the Tariff Act of 1922. 42 Stat. 858 (1922). Treasury Department records produced in the *Zenith* litigation confirm that not once in the sixty year history of this provision did the Secretary of the Treasury use it for the compromise of antidumping duties. Nevertheless, under the terms of the April 28 settlement agreements,

the government agreed, *inter alia*, not to assess what COMPACT, the Imports Committee, and Zenith believe are hundreds of millions of dollars in dumping duties called for under the law.

In the present litigation, Zenith challenges the lawfulness of the April 28, 1980 settlement agreements on a variety of legal, substantive, and procedural grounds. Count I of the Zenith complaint alleges that section 617 does not authorize the Secretary of Commerce to bypass the procedures for an annual determination of antidumping duties under section 751(a) of the Act, 19 U.S.C. § 1675(a) (Supp. III 1979). Count II of the Zenith complaint alleges that even if there is some authority to compromise antidumping duties under section 617, the April 28, 1980 settlement agreements were entered into in bad faith and were solely the product of political considerations; and that officials of the United States Government abdicated their responsibility under the antidumping law, not only by circumventing the explicit procedural directives imposed by the Trade Agreements Act of 1979, but by consciously disregarding the interests of the intended beneficiaries of T.D. 71-76—the domestic television industry and its workers. See particularly paragraphs 34-37 of Zenith's First Amended Complaint, reproduced in Zenith's Petition for Certiorari, App. F at 58a-61a.

The *Zenith* case came before the CCPA on an appeal by a nonparty from an order of the trial court denying the government's motion for a protective order precluding discovery. The CCPA bypassed the narrow discovery issue before it and decided *sua sponte*—without the benefit of oral argument, without briefing on point, without a printed record, and without the benefit of revealing discovery documents which had been called to the attention of the trial court—profound issues going to the very heart of the subject matter jurisdiction of the new Court of International Trade.

In its haste to dispose of the Zenith litigation, the CCPA appeared to confuse subject matter jurisdiction with the merits. The Court brushed aside Zenith's allegations of bad faith as "perfunctory" and ordered the action dismissed for lack of subject

matter jurisdiction. *Montgomery Ward & Co., Inc. v. Zenith Radio Corp., supra*, 673 F.2d at 1264-65. Whether Zenith's allegations of bad faith presented a cognizable claim is a question which, if bad faith is reviewable at all, goes to the merits of its cause of action. The CCPA could not, of course, rule on the merits of Zenith's causes of action under the guise of subject matter jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682 (1946). By directing dismissal of Zenith's action for lack of subject matter jurisdiction, one possible reading of the CCPA's decision is that matters committed by law to agency discretion are never reviewable even where bad faith or abuse of discretion are alleged. It is, of course, possible that the CCPA mistakenly cast its decision in terms of subject matter jurisdiction because that was the only way it could dispose completely of the Zenith litigation on a *sua sponte* basis even though the only question before it was a narrow collateral discovery issue raised by a stranger to the litigation.

The CCPA's opinion illustrates the trouble an appeals court can get itself into when it accepts jurisdiction over an interlocutory discovery order and then strays into questions related to the merits or subject matter jurisdiction without a proper record before it and without briefing of such important issues by the parties. Quite apart from the important substantive issues raised by the Zenith petition, the action of the CCPA in deciding issues of such great importance *sua sponte*, without the benefit of briefs, oral argument, or a printed record and without reference to the materials produced by the government during discovery "has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's power of supervision." Sup. Ct.R. 17.

REASONS FOR GRANTING THE WRIT

1. The question of whether the procedural safeguards and the rights of judicial review established in the Trade Agreements Act of 1979 can be ignored by reliance on the general compromise authority contained in section 617 presents a substantial question respecting the enforcement of our international trade laws with important implications for the general body of administrative law.

The issue presented in this matter is one of major importance under the antidumping law as well as under general principles of administrative law. Simply put, the question is whether a grant of general compromise authority enacted in its modern form in 1922[5] and never previously used in an antidumping proceeding can be deemed to constitute a nonreviewable commitment of settlement authority to agency discretion within the meaning of section 10 of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2) (1976). The CCPA would permit the Secretary of Commerce to exercise the claimed settlement authority uninhibited in any way by the provisions of the 1979 legislation which granted domestic interests elaborate procedural rights to participate in the orderly administrative determination of antidumping duties—the subject matter of the proposed settlement—as well as specific rights to judicial review of that administrative determination.[6] The ability of the Secretary of Commerce to bypass the specific procedures mandated by Congress for the assessment and collection of antidumping duties, as well as the ability to preclude judicial review of his actions under the claim that settlement authority is wholly committed to agency discretion, raises an issue of enormous significance under the antidumping law. The

5. *See* Zenith's Petition for Certiorari at 12 n.15.

6. The CCPA specifically held that "[t]he only law to apply here is set forth as procedural requirements in 19 U.S.C. § 1617, and any legal wrong to Zenith must be based on the Secretary's violation of the procedures set forth therein." 673 F.2d at 1262. The salient provisions of the antidumping law ignored by the court are set forth in footnote 4, *supra*.

resolution of that issue by this Court will involve the Court in an issue of great importance to the general body of administrative law as well.

The CCPA's decision ignores the presumption of reviewability articulated in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), where this Court stated that this presumption may be overcome only by "clear and convincing evidence." *Id.* at 141. In the landmark case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), this Court stated that the "committed to agency discretion" exception is "very narrow," applicable only in those "rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Id.* at 410 (quoting S.Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). In the present case, this Court will have the opportunity to clarify this frequently criticized "no law to apply" dictum.[7] In the event that the Court considers this standard to be of continued utility, it will be asked to decide whether the search for "law to apply" is to be confined to the admittedly general provisions of section 617 or whether a reviewing court should conduct a fair appraisal of the entire legislative scheme relating to dumping matters, including the legislative policies underlying the procedural safeguards enacted by Congress in the Trade Agreements Act of 1979.

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7. Professor Davis, in the latest supplement to his treatise on administrative law, characterizes the "no law to apply" standard as an "infection" attacking the body of law of judicial review of administrative action, and prescribes as a cure the "antibiotic" contained in section 706(2)(A) of the APA that "The reviewing court shall . . . set aside agency action . . . found to be . . . an abuse of discretion." K. Davis, Administrative Law Treatise § 28.16, at 499 (Supp. 1982). In Davis' view, "*Discretion which is unguided by law is often more in need of review than discretion in applying law.*" *Id.* (emphasis in original).

Such respected commentators as Louis Jaffe and Raoul Berger are in substantial accord with Professor Davis' view that *abuses* of discretion are reviewable notwithstanding the provisions of section 701(a)(2) of the APA. *See, e.g.*, L. Jaffe, Judicial Control of Administrative Action 359, 375 (1965); Berger, *Administrative Arbitrariness and Judicial Review*, 65 Colum L. Rev. 55 (1965).

2. There is a conflict between the U.S. Court of Customs and Patent Appeals and the U.S. Court of Appeals for the District of Columbia Circuit with respect to the reviewability under the Administrative Procedure Act of an exercise of settlement authority by federal officials.

The decision of the CCPA in the present litigation is diametrically opposed to the decision of the D.C. Circuit in its recent decision in *Local 1219, American Federation of Government Employees v. Donovan*, No. 81-2284 (D.C. Cir. July 13, 1982). In *Zenith*, the CCPA stated:

> No situation is more within the category of "no law to apply" than the multifaceted judgmental decision to settle a claim. Thus, the substance of the settlement is clearly outside the scope of judicial review.

673 F.2d at 1262.

In *Local 1219, supra*, the D.C. Circuit was called upon to address the authority of the judiciary to review a settlement agreement between the Department of Labor and a federal employees' union which resolved charges of unfair election procedures pursuant to section 7120 of the Civil Service Reform Act of 1978, 5 U.S.C. § 7120, and regulations promulgated thereunder, 29 C.F.R. § 208.66. Plaintiff appellees, four locals of the employees' union and 86 individual members, filed suit claiming that the settlement agreement failed to provide an appropriate remedy for the violation. The plaintiffs in *Local 1219* were the intended beneficiaries of the Civil Service Reform Act of 1978, just as an injured domestic industry and its workers are the intended beneficiaries of the antidumping law.

Unlike the CCPA in *Zenith*, the D.C. Circuit in *Local 1219* had little difficulty in harmonizing the *Overton Park* "no law to apply" dictum with the "strong presumption of judicial review" relied upon in *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979). *Local 1219, supra*, slip op. at 7. Looking at the entire legislative and regulatory scheme as well as clear expressions of congressional purpose, the court found more than sufficient "law to apply." *Id.* at 8-9. The CCPA, on

the other hand, ignored the overall statutory scheme of the antidumping law and conducted its search for "law to apply" solely within the narrow framework of section 617. *See* footnote 6, *supra*. The CCPA failed to find a single substantive constraint upon the Secretary of Commerce's putative authority to settle claims for antidumping duties. Moreover, the D.C. Circuit specifically rejected the government's contentions—so readily accepted by the CCPA—that judicial review was inappropriate because "settlement negotiations involve special matters of agency expertise" and that courts are ill-suited to assess the impact of a settlement. *Id.* at 9. In contrast, the D.C. Circuit held that courts are "well acquainted with the task of approving settlements of enormous complexity [and] . . . . especially suited to the task of assuring that the interests of those not party to the negotiations have been adequately protected." *Id.* at *10*.

The CCPA, soon to be melded into the U.S. Court of Appeals for the Federal Circuit, and the D.C. Circuit are two of the most important federal appeals courts which deal with challenges to federal agency action under section 10 of the Administrative Procedure Act. The chasm between these two courts on the question of reviewability of agency settlement authority could not be wider. Clarification of this Court's decision in *Overton Park* is badly needed and long overdue.

3. Assuming *arguendo* that the execution of bilateral settlement agreements in antidumping proceedings is a matter committed by law to agency discretion, the pending petition raises the fundamental question of whether review of discretionary action is appropriate when allegations of bad faith are made.

The decision below raises an important question of administrative law: under what circumstances, if any, are allegations of bad faith and abuse of discretion reviewable in situations where the underlying agency action is held to be committed by law to agency discretion? Before discussing the compelling reasons why this question ought to be addressed, some of the allegations of bad faith which were called to the attention of the courts below

should be examined. The following recitation is given for illustrative purposes only and is by no means a complete statement of the evidence of the government's bad faith amassed thus far in the *Zenith* litigation.

Zenith's complaint, together with supporting evidence submitted to both the Court of International Trade and the CCPA, raises substantial and non-frivolous issues with respect to "bad faith." Prior to Spring 1978, the Treasury Department had permitted over six years of television imports to enter the country without assessing antidumping duties. In May of 1977 the United States and Japan entered into an Orderly Marketing Agreement (OMA) restricting Japan's color television exports to this country. At the time this OMA was negotiated, a secret side agreement was also executed in which the United States Special Trade Representative agreed that antidumping duties would thereafter be assessed "in strict conformity with the international [sic] Antidumping Code."[8] Since the assessment of duties under the Code would be less than duties assessed under the Antidumping Act of 1921, this agreement probably violated Pub. L. No. 90-634, tit. 2, § 201, 82 Stat. 1347 (1968) requiring any conflict to be resolved in favor of the 1921 Act. The Government of Japan took the position that this secret side agreement barred further assessment of duties.[9] While the United States has denied that the Government of Japan's interpretation was correct, the insistence of the Government of Japan that the United States was reneging on an agreement undoubtedly contributed to the subsequent willingness of our government to curtail the enforcement of the television dumping finding in response to political pressures from Japan.

During March of 1978 the Customs Service was preparing to assess approximately $382 million in antidumping duties on television receivers imported prior to April 1977. At the last

8. See paragraph 37 of Zenith's First Amended Complaint, which is reproduced in Zenith's Petition for Certiorari, App. F at 60a. The secret side agreement was finally made public at hearings before the House Trade Subcommittee in 1978. *See Multilateral Trade Negotiations: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means* (Serial 95-90), 95th Cong., 2d Sess. 15-17 (1978).

9. *Administration of the Antidumping Act of 1921: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means* (Serial 95-114), 95th Cong., 2d Sess. 262 (1978).

moment, however, following a meeting between Treasury Department officials and officials from the Japanese Embassy, those planned assessments were cut to $46 million, covering sets imported only through mid-1973. Zenith Petition for Certiorari, App. F at 49a-50a. A State Department memorandum dated June 21, 1978, later produced in the *Zenith* litigation and called to the attention of the CCPA, described the reasons behind the last minute decision to circumscribe the planned assessments. The memorandum describes a State Department meeting with an official at MITI's Americas Bureau:

> On June 8 I had dinner with an official from MITI's Americas Bureau.
>
> I congratulated him on his part in devising the GOJ negotiating tactics and scenario on the color TV dumping issue in late March and described to him our preceptions of the tactics (see my June 1 memo to you).
>
> He accepted the compliment and confirmed that the tactics were as I described them. He added that MITI, the Ministry of Foreign Affairs, and the Japanese TV industry had met for two days solid in March,—with the sessions extending late at night, to develop tactics. They were not very confident that they would succeed, he said, but they were very happy with the outcome. *He ascribed the GOJ success to approaches to the most senior USG trade policy officials, who could then make a "political decision."* (emphasis added).[10]

Evidence of political rather than legal decisions is apparent throughout. Actual settlement negotiations with representatives of the Government of Japan began in October 1978. In late November 1978, a special assistant to the General Counsel of the Treasury Department travelled to Japan to conduct settlement negotiations with the Japanese Government. Certain tentative commitments with respect to the administration of T.D. 71-76, which *amici* believe at least bordered on illegality, were made by the United States during those talks. Notes made by the Treasury Department official during the negotiations reflect

10. This entire memorandum may be found in Appendix 4 of the *amicus* brief filed by COMPACT and the Imports Committee in support of Zenith's petition for rehearing before the CCPA.

acquiesence by U.S. officials in schemes to permit reimbursement by foreign producers of dumping duties paid by U.S. importers; under applicable regulations, the government must deny importers the benefits of reimbursement, *see* 19 C.F.R. 353.55 (1981); *id.* § 153.49 (1979). These notes also evidence schemes to rig subsequent verification efforts by the Customs Service in order to facilitate the granting of claims for adjustments which would lower dumping duties,and agreements to revoke the dumping finding as soon as possible.

This initial settlement initiative was aborted in December 1978, when Treasury officials were informed by members of Congress that implementation of the Tokyo Round of the Multilateral Trade Negotiations would be in jeopardy if T.D. 71-76 were settled as proposed. After approval of the Multilateral Trade Agreements, settlement efforts were resumed, with the Office of the United States Special Trade Representative continuing its intense involvement. A November 8, 1979 State Department memorandum establishes that in the fall of 1979, Ambassador Alan Wolff, Deputy Special Trade Representative, informed certain representatives of Japanese television manufacturers that he hoped T.D. 71-76 would be settled before the end of 1979, when jurisdiction over T.D. 71-76 was to be transferred to the Commerce Department and it was feared that settlement prospects would be complicated because Commerce "will want to prove itself."[11]

Following transfer of responsibility over T.D. 71-76 to the Commerce Department in January of 1980, documentary evidence establishes that settlement strategy and negotiations were managed by R. Theodore Hume, then Assistant General Counsel in the Office of the United States Trade Representative ("USTR"), not by the Commerce Department. The record as a whole shows that the General Counsel of the Commerce Department was merely a pawn in the entire settlement process, which had been set in motion at an earlier time and which was being

11. The entire memorandum may be found in Appendix 6 of the *amicus* brief filed by COMPACT and the Imports Committee in support of Zenith's petition for rehearing before the CCPA.

managed out of the Office of the USTR. The Special Trade Representative's secret side agreement in 1977 had clearly raised the expectations of the Government of Japan with respect to the enforcement intentions of the United States in the television dumping proceeding. The USTR's special interest in smoothing things over with Japan and eliminating the problem created by Japan's expectations following the 1977 secret side agreement clearly had a much higher priority than enforcement of the antidumping law for the benefit of an injured domestic industry.

In an effort to cloak the April 28, 1980 settlement agreements with a gloss of administrative regularity, the government included in the record the Declaration of the former General Counsel of the Commerce Department. That Declaration, which included a copy of the General Counsel's April 28,1980 settlement recommendation to the Secretary, contains a number of false and misleading statements, significant portions of which are material under the provisions of section 617:

— Paragraph 8 of the Declaration states that officials of the Department of Commerce completed the estimate that the maximum amount of antidumping duties that could be claimed was $138.7 million. In fact, the estimate was not made by responsible officials at Commerce, as required by section 617, but rather by the Assistant General Counsel, USTR, using a computer maintained by the USTR.

— Paragraph 9 of the Declaration states that following the General Counsel's return from Japan in April 1980, additional analyses of litigation risks and probabilities of recovery were made. Paragraph 12 states that litigation risks were analyzed "for each importer." In fact, the Deputy General Counsel for Import Administration, the General Counsel's principal legal advisor in antidumping matters (including T.D. 71-76), disclosed that neither he nor anyone on his staff conducted such an analysis.

— On pages four, five and seven of the General Counsel's April 28, 1980 memorandum to the Secretary, it states that *the maximum* amount of dumping duties which could be claimed using theories *most favorable* to the

government was $138.7 million. In fact, the $138.7 million projection is based upon legal theories and factual findings most hospitable to importers, not the government. The $138.7 million was close to the *minimum*, not the maximum, amount which could be collected.

— On page four of the April 28, 1980 memorandum, the General Counsel advised the Secretary that even the $138.7 million could be lowered in court challenges by importers. The General Counsel failed to advise the Secretary that the $138.7 was subject to increase if a court challenge by domestic interests were successful.

— On pages five through six of the April 28, 1980 memorandum, the General Counsel urged that settlement was desirable because the use of the Japanese Commodity Tax methodology in ascertaining foreign market value was vulnerable to attack in litigation. Neither the General Counsel nor any of the memoranda which discuss the vulnerability of the Japanese Commodity Tax methodology pointed out that use of that methodology accounted for only a small portion of the actual duty liability of importers. The great bulk of importers' liability turned on routine legal questions regarding circumstances of sale adjustments and the like. In reality, the government could abandon the perceived risk of the Commodity Tax methodology without significantly lowering the dumping duty exposure of importers. References to litigation risks surrounding the Japanese Commodity Tax methodology were highly misleading.

The report provided to the Secretary of Commerce was not a reasoned factual analysis of the basis for settlement. In reality, those documents were facile and biased attempts to "paper over" the settlement, and were knowingly premised upon questionable legal positions and an illusory factual foundation. They were written solely to provide the means to achieve a desired end. Critical factual predicates in the General Counsel's rationale were untrue.

This is not a case where a plaintiff must probe the "mental processes" of the Secretary in order to overturn the substance of his decision. Indeed, the materials presented to the Secretary of

Commerce upon which his "mental processes" were presumably to function were so tainted and so demonstrably inadequate to prepare him for the decision at hand that whatever "mental processes" he engaged in in approving the settlement had to be entirely irrelevant.

The foregoing evidence of bad faith was adduced before the CCPA—and is again recited for this Court—merely to establish that Zenith's claims are not frivolous. Whether the settlement agreements were indeed the product of bad faith is an issue of fact which the Court of International Trade should be permitted to try on the basis of all the evidence available to the parties. If the CCPA's opinion means that claims of bad faith in the exercise of administrative discretion are simply not cognizable by the courts of law—that Zenith has no right to attempt to prove its allegations—then the CCPA's opinion raises questions with profound significance for the future administration of the antidumping law.

This Court has never directly ruled on the issue of whether or under what circumstances discretionary action may be reviewed where there are allegations that the agency's actions were motivated by bad faith or clearly defiant of the law. The door to such review was, however, left open in *Dunlop v. Bachowski*, 421 U.S. 560 (1975). The present controversy presents one of those "rare case[s]" where the administering authority is charged with completely abrogating its enforcement responsibilities—a circumstance under which even the Government, in *Dunlop, supra*, conceded the existence of reviewing authority. *Id.* at 573.

CONCLUSION

This Court has long advocated a presumption of judicial review. *Abbott Laboratories v. Gardner, supra* at 140. There is not a scintilla of evidence to support the proposition that Congress intended to commit the compromise of antidumping duties to agency discretion. Indeed, all indications are to the contrary. A more serious question is whether section 617 may be applied in antidumping proceedings at all when the result of such application is to abrogate the newly-enacted procedural safeguards of the

antidumping law. Assuming *arguendo* that the archaic provisions of section 617 can be harmonized with the specific procedural safeguards of the 1979 law, it is clear that the CCPA's ruling is faithful neither to the presumption of reviewability established by this Court nor to the obvious purpose of recent congressional reforms in the area of international trade. Congressional efforts to endow the new Court of International Trade with subject matter jurisdiction broad enough to permit it to deal with the full range of issues arising in international trade disputes have been frustrated while the new court is still in its infancy. Since the CCPA is the only appellate court with jurisdiction over matters affecting international trade, it is essential that its unprecedented decision be reviewed by this Court at the earliest possible date.

For the foregoing reasons, Zenith's petition for a writ of certiorari should be granted.

Respectfully submitted,

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